88-1185

No. 88-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM S. WALTERS, JR.,
Petitioner,

vs.

FIRST TENNESSEE BANK,
N.A. MEMPHIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 1989

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QUESTIONS PRESENTED

1. Whether Public Law 96-161, December 28, 1979, 93 Stat. 1237-1238, §205 (codified at 12 U.S.C. §86a), 1240 §213; Public Law 98-221, March 31, 1980, 94 Stat. 164, §512, 168 §529; and Public Law 96-399, October 8, 1980, 94 Stat. 1648 §512 (the latter two being amendments to the former) violated the Constitution of the United States, Amendment 5 (for the same reasons Article 1 §10 prohibits state action doing the same), facially and as applied, as an unlawful impairment of contract.

2. Whether it is possible for a national bank, by an interest overcharge, to breach a contract to loan money unless the overcharge is done with requisite knowledge to constitute a violation of 12 U.S.C. §86 prohibiting usurious overcharges by national banks.

3. Whether the requisite knowledge for a national bank to violate 12 U.S.C. §86 is knowledge specifically possessed by a specifically identified human agent deliberately acting for the national bank designedly overcharging a borrower or is general knowledge of the national bank as an entity whereby the entity is charged with knowledge of its actions irrespective of whether any agent, individually considered, possessed the knowledge.

4. Whether a mistake of fact, other than a scrivener's error or a mathematical miscalculation, is assertable by a national bank as a defense to what, otherwise, would be a usurious overcharge under 12 U.S.C. §86.

5. Whether the knowledge on the part of a national bank requisite to a finding that an interest overcharge by a national bank violates 12 U.S.C. §86 is general knowledge or is specific intent-type knowledge.

6. Whether the $25,000 charge by respondent collected from petitioner for 208 days of interest calculated at a rate in excess of the maximum allowed by the law of Tennessee was the result of a mistake of law by respondent.

7. Whether the intent required to violate 18 U.S.C. §1341 (mail fraud statute) is a general intent to defraud or a specific intent to defraud.

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1
STATEMENT 2
REASONS FOR GRANTING WRIT 11
CONCLUSION 30

APPENDIX (printed under separate cover):

Opinion of the United States Court of Appeals, Sixth Circuit in *Walters v. First Tennessee Bank, N.A. Memphis,* 855 F.2d 267 (6th Cir. 1988) A1
Judgment of United States District Court, Western District of Tennessee, Western Division (Filed August 15, 1986) A25
Order Directing Entry of Judgment in United States District Court, Western District of Tennessee, Western Division (Filed August 15, 1986) A28
Ruling on Post-Trial Arguments and Motions in United States District Court, Western District of Tennessee, Western Division (Filed June 4, 1986) A31
Civil Docket Continuation Sheet A46
Trial Transcript Excerpts A49
Order of United States Court of Appeals, Sixth Circuit (Filed October 14, 1986) A59
Pertinent Statutes A60
Opening Brief of Appellant, William S. Walters, Jr. A67

Appellant's Petition to Rehear A86
Joint Brief of Appellee, First Tennessee Bank N.A. Memphis A94
Reply Brief of Appellant, William S. Walters, Jr., ...A105
Promissory Note A115
Constitutional Provisions and Statutes Involved ..A120
Response of Walters to First Tennessee Motion to Dispose of Pending Motion for Summary Judgment, and to Apply Collateral Estoppel to Usury Issues in Cause Nos. 82-2391-H and 82-2783-H ..A125

TABLE OF AUTHORITIES

Cases

Alabama Power Company v. McIntosh, 219 Ala. 546, 122 So. 677 (1929) 24
American Medical Association v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943) 23
American National Bank And Trust Company of Chicago v. Haroco, Inc., 473 U.S. 606 (1985) 3
American Socialists Society v. United States, 266 F. 212 (2nd Cir. 1920), cert. denied, 254 U.S. 637 (1920) 24
Armco Industrial Credit Corporation v. SLT Warehouse Company, 782 F.2d 475 (5th Cir. 1986) 29
Atlas Realty Corporation v. House, 192 A. 564 (Conn. 1937) 20
Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982) 22
Buford v. American Finance Co., 333 F.Supp. 1243 (N.D. Ga. 1971) 22
Caldwell & Company v. Lea, 152 Tenn. 48, 272 S.W. 715 (1925) 25

Citizens National Bank of Kansas City v. Donnell, 195 U.S. 369 (1904) 18
Continental Baking Company v. United States, 281 F.2d 137 (6th Cir. 1960) 25
Cotton v. Commonwealth Loan Co., 190 N.E. 853 (Ind. 1934) 20
Deaver v. United States, 155 F.2d 740 (D.C. Cir. 1946) 29
Dews v. Eastham, 10 Tenn. 463 (1830) 25
Dickey v. Bank of Clarksdale, 184 So. 314 (Miss. 1938) 20
Dollar S. S. Company v. United States, 101 F.2d 638 (9th Cir. 1939) 25
Dreyfus Company, Inc. v. Tim Wargo and Sons, Inc., 668 S.W.2d 957 (Ark. 1984) 20
Dupree v. Virgil R. Coss Mortgage Co., 267 S.W. 586 (Ark. 1925) 20
Durland v. United States, 161 U.S. 306 (1896) 27
Fisher v. Bethesda Discount Corporation, 157 A.2d 265 (Md. App. 1960) 20
Ford Motor Credit Co. v. Catalini, 383 S.W.2d 99 (Ark. 1964) 20, 21
Gem City Motors, Inc. v. Minton, 109 Ga.App. 842, 137 S.E.2d 522 (1964) 24
Grant Brothers Construction Company v. United States, 13 Ariz. 388, 114 P. 955 (1911), aff'd, 232 U.S. 647 (1914) 24
Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974) 22
Hebron Bank v. Gambrell, 77 So. 148 (Miss. 1918) 20
Holland v. Doan, 307 S.W.2d 538 (Ark. 1957) 20, 21
Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951) 23-24
Ives v. W.T. Grant Co., 522 F.2d 749 (2nd Cir. 1975) 22

Jefferson Standard Life Ins. Co. v. Davis, 163 So. 506 (Miss. 1935) 20
Johnson v. Associates Finance, Inc., 369 F.Supp. 1121 (S.D. Ill. 1974) 22
Kaufmann v. United States, 282 F.2d 776 (3rd Cir. 1922), cert. denied, 260 U.S. 735 (1922) 29
Kessing v. National Mortgage Corporation, 180 S.E.2d 823 (N.C. 1971) 20
Lawrence v. Morrison, 9 Tenn. 444 (1830) 25
Lloyd v. Scott, 7 L.Ed. 833 (1830) 18, 20
McCollum v. Hamilton National Bank, 303 U.S. 245 (1938) 18
McNally v. United States, 483 U.S. ....., 107 S.Ct. ....., 97 L.Ed.2d 292 (1987) 27
Mariscal v. United States, 449 U.S. 405, 101 S.Ct. 909, 66 L.Ed.2d 616 (1981) 27
Marquette National Bank of Minneapolis v. First Omaha Service Corporation, 439 U.S. 299 (1978) 11
Muir v. Newark Sav. Inst., 16 N.J.Eq. 537 20
Nashville Bank v. Hays, 9 Tenn. 243 (1829) 25
Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974) 22
Paloeian v. Day, 299 Mass. 586, 13 N.E.2d 398 (1938) .. 24
Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960)..... 27
People v. Canadian Fur Trappers Corporation, 248 N.Y. 159, 161 N.E. 455 (1928) 24
Pyler v. McGee, 57 S.E. 57 (S.C. 1907) 20
Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971) 22
Rossberg v. Hosesapple, 260 P.2d 563 (Utah 1953) 20
Sarna v. American Bosch Magneto Corp., 290 Mass. 340, 195 N.E. 328 (1935) 24

Schreiber Distributing Company v. Serve-Well Furniture Company, 806 F.2d 1393 (9th Cir. 1986) 30
Shirley v. Shirley, 181 S.W.2d 346 (Tenn. 1944) 25
Slater v. Missouri Edison Company, 245 S.W.2d 457 (Mo.App. 1952) 24
State v. Louisville & Nashville Railroad, 91 Tenn. 445, 19 S.W. 229 (1892) 25
Teshner v. Roome, 212 P. 473 (Ore. 1923) 20
The Bank of the United States v. Waggener, 9 L.Ed. 163 (1835) 18
United States v. American Stevedores, Inc., 310 F.2d 47 (2nd Cir. 1962), cert. denied, 371 U.S. 969 (1963) 23
United States v. Armour & Company, 168 F.2d 342 (3rd Cir. 1948) 25
United States v. Austin-Bagley Corp., 31 F.2d 229 (2nd Cir. 1929), cert. denied, 279 U.S. 863 (1929) 23
United States v. Baliant, 258 U.S. 250 (1922) 19
United States v. Bibby, 752 F.2d 1116 (6th Cir. 1985) 30
United States v. Cadillac Overall Supply Company, 568 F.2d 1078 (5th Cir. 1978), cert. denied, 437 U.S. 903 (1978) 25
United States v. Dick, 744 F.2d 546 (7th Cir. 1984) 29
United States v. Dotterweich, 320 U.S. 277 (1943) 19
United States v. Frankel, 721 F.2d 917 (3rd Cir. 1983) 29
United States v. Freed, 401 U.S. 601 (1971) 19
United States v. General Motors Corporation, 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941) 23
United States v. Harry L. Young & Sons, 464 F.2d 1295 (10th Cir. 1972) 25
United States v. Hilton Hotels Corporation, 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973) 25

United States v. Kemmel, 160 F.Supp. 718 (M.D. Penn. 1958) 25
United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) 27, 28
United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974) 27
United States v. Park, 421 U.S. 658 (1975) 19
United States v. Powell, 513 F.2d 1249 (8th Cir. 1975) 18
United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962) 27
United States v. Sawyer Transport, Inc., 337 F.Supp. 29 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972) 24
United States v. Stern, 535 F.2d 512 (9th Cir. 1976) 25
United States v. Thaggard, 477 F.2d 626 (5th Cir. 1973) 18
United States v. Thompson-Powell Drilling Company, 196 F.Supp. 571 (N.D. Tex. 1961) 25
United States v. T.I.M.E.-D.C., Inc., 381 F.Supp. 730 (W.D. Va. 1974) 23
United States v. Wood, 446 F.2d 505 (9th Cir. 1971) 18
United States v. Y. Hata & Company, 535 F.2d 508 (9th Cir. 1976), cert. denied, 429 U.S. 828 (1977) 25
United States v. Young Brothers, 728 F.2d 682 (5th Cir. 1984) 23
Vee Bee Service Co. v. Household Finance Corporation, 51 N.Y.S.2d 590 (N.Y. S.Ct. 1944) 20
Welmaker v. W.T. Grant Co., 365 F.Supp. 531 (N.D. Ga. 1972) 22
Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522 (9th Cir. 1987) 29

Constitutional Provisions

Constitution of Tennessee, Article 1 §20 1
Constitution of Tennessee, Article 11 §7 ..... 1, 13
United States Constitution, Article 1 §10 1
United States Constitution, Amendment 5 1

Statutes

12 U.S.C. §85 ..... 1, 3, 11, 16
12 U.S.C. §86 ..... 1, 6, 19, 21
12 U.S.C. §86a ..... *passim*
15 U.S.C. §1601 et seq. 22
18 U.S.C. §1341 (1976) 2
18 U.S.C. §1961 2
18 U.S.C. §1962 2
18 U.S.C. §1962(a) and (c) 3
18 U.S.C. §1964(c) 3
28 U.S.C. §1254(1) 1
Public Law 96-161, December 28, 1979, 93 Stat. 1240 §213 ..... 2, 3
Public Law 96-221, March 31, 1980, 94 Stat. 164 §512 2
Public Law 96-221, March 31, 1980, 94 Stat. 168 §529 2
Public Law 96-399, October 8, 1980, 94 Stat. 1648 §512 2
Tennessee Code Annotated §47-14-103(2) (1979) 1, 3

Other Authorities

17 C.J.S., Contracts, §201 p. 1001 25
47 C.J.S., Interest and Usury, §120 p. 223 20
Comyn, *Law of Usury* p. 7 20
125 Cong. Rec. 29,911, 30,610, 31-309-31,310, 31,320-31,327 (1979) 12

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126 Cong. Rec. 16,112, 22,668 (1980) 12

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S. Rep. No. 96-423, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News 2584 12

S. Rep. No. 96-736, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News 3506 12

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William S. Walters, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A1-24) is reported at 855 F.2d 267. The opinion (App. A31-45) of the district court is not reported.

JURISDICTION

The judgment of the court of appeals (App. A1-24) was entered on August 16, 1988. A petition for rehearing by the court of appeals was denied on October 14, 1988 (App. A59). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The United States Constitution, Article 1 §10, in pertinent part, provides: (See Appendix)
2. The Constitution of Tennessee, Article 1 §20, in pertinent part, provides: (See Appendix)
3. The United States Constitution, Amendment 5, in pertinent part, provides: (See Appendix)
4. The Constitution of Tennessee, Article 11 §7, in pertinent part, provides: (See Appendix)
5. Tennessee Code Annotated §47-14-103(2) (1979) provides: (See Appendix)
6. In pertinent part, 12 U.S.C. §85 provides: (See Appendix)
7. In pertinent part, 12 U.S.C. §86 provides: (See Appendix)

8. In pertinent part, 12 U.S.C. §86a provides: (See Appendix)
9. In pertinent part, Public Law 96-161, December 28, 1979, 93 Stat. 1240 §**213** provides: (See Appendix)
10. In pertinent part, Public Law 96-221, March 31, 1980, 94 Stat. 164 §**512** provides: (See Appendix)
11. In pertinent part, Public Law 96-221, March 31, 1980, 94 Stat. 168 §**529** provides: (See Appendix)
12. In pertinent part, Public Law 96-399, October 8, 1980, 94 Stat. 1648 §**512** provides: (See Appendix)
13. In pertinent part, 18 U.S.C. §1341 (1976) provides: (See Appendix)
14. In pertinent part, 18 U.S.C. §1961 provides: (See Appendix)
15. In pertinent part, 18 U.S.C. §1962 provides: (See Appendix)

STATEMENT

On May 3, 1979, petitioner, an individual, made a $475,000 business loan from respondent, a national bank (App. A4). The contract governing the loan terms was evidenced by a written promissory note (App. A115).

After receiving the recapitulation from respondent as requested, on May 28, 1982, petitioner filed his complaint because of the alleged overcharging of interest (App. A72). A declaratory judgment was requested to adjudge what the term "prime rate," used in the loan contract, meant. Additionally, petitioner alleged that respondent was liable for common law misrepresentation with respect to what the base interest rate used to calculate and charge petitioner interest was, and claimed that respondent (1) breached the loan contract by overcharging contractually agreed interest; (2) breached the confiden-

tial relationship between petitioner and respondent in that petitioner vested confidence in respondent to calculate the correct amount of interest using correct information known only (App. A72) to respondent. Petitioner, additionally, charged respondent with violation of 18 U.S.C. §1962(a) and (c) and sought relief under 18 U.S.C. §1964(c) alleging "prime rate fraud" familiar to the Court from *American National Bank And Trust Company of Chicago v. Haroco, Inc.*, 473 U.S. 606 (1985).

The allegation is that respondent designedly set about to overcharge interest to its prime-plus business borrowers. The district court directed a verdict with respect to petitioner's breach of contract and breach of confidential relationship claims without specification as to what prompted the directed verdict (App. A34-35).

The district court directed a verdict against petitioner dismissing the common law misrepresentation (App. A82-83) claim and the prime rate fraud claim.

The rulings of the district court with respect to the usury claims require a bit more explanation. The sequence of events, with special emphasis on the days and the years of those events, complicate the usury situation. It is important to note that there is no factual dispute with respect to how much interest was charged and collected nor that the amount of interest collected, in toto, exceeded the total amount of interest permitted by governing law, irrespective of various amendments to the law which interceded at various times.

The subject loan was made on May 3, 1979. The governing law with respect to the maximum amount of interest chargeable was that codified in TCA §47-14-103 (2) (1979) and 12 U.S.C. §85. The contract which fixed the terms of the loan explicitly incorporated these statutory provisions (infra p. 9).

Under the governing statutes on May 3, 1979, it is undisputed that there existed no law nor facts which would permit respondent to charge or collect from petitioner interest at a rate greater than 18%. Further, it is undisputed that there were gaps of time during which the maximum amount which respondent could charge was less than 18%. Finally, it is undisputed that there were 37 days between May 1980 and October 1980 on which respondent collected from petitioner interest at a rate greater than the maximum permissible under the indisputably governing law.

On December 28, 1979 (almost 8 months after petitioner's loan was made, Congress enacted 12 U.S.C. §86a. In short, this statute, for loans like the subject loan, preempted certain (but did not preempt other) state laws fixing usury ceilings for national banks. Section 213 of §86a has never been codified but explicitly postponed the applicability of §86a in states, such as Tennessee (App. A64-65), which had constitutional provisions regarding maximum interest rates, until July 1, 1981.

However, on March 31, 1980 (App. A65) and October 8, 1980 (App. A66), Congress amended 12 U.S.C. §86a, and these amendments are the basis for a dispute between petitioner and respondent with respect to how, if at all, respondent (1) was relieved from the loan contract and, if relieved (2) could constitutionally charge more interest than the contract, standing alone, would have allowed (App. A78, A97-104). This dispute exists based on undisputed facts (App. A69-70) and is a pure law question.

The critical importance of the question at hand, likewise, proceeds without factual dispute (App. A69-70). That is, indisputably, between December 1980 and mid-November 1981 respondent collected approximately $25,000 in interest over and above the amount which could

have been collected unless the amendments to §86a passed by Congress on March 31, 1980 and October 8, 1980 permitted respondent to collect more interest than could be collected at the rate of 18%. The decision of respondent to exact interest at a rate in excess of 18%, indisputably (App. A98-104), was based on an interpretation of law by respondent's counsel. There exists no dispute (App. A69-70) that, if respondent's interpretation of the law was a mistake, interest collected over 18% constituted indefensible usury.

The action (App. A32-45) of the district court relative to the usury claims is now in context. Petitioner claimed that, if the March 31, 1980 and October 8, 1980 amendments to §86a were applicable to the loan (which predated §86a) so as to allow respondent to deviate from the loan contract, the March 31 and October 8, 1980 amendments were unconstitutional impairments of contract.

The district court first ruled (App. A50-51) that the §86a amendments did not apply to the interest charges in question; therefore, the interest ceiling was 18%. Based on this ruling, it became indisputable that the 208 days from December 1980 through November 1981 on which respondent collected interest in excess of 18% amounted to usury. However, on reconsideration, the district court reversed itself (App. A73) and, with no discussion, dismissed (App. A78) petitioner's claim that, if applied to the subject loan, §86a would amount to an unconstitutional impairment of contract.

With respect to the undisputed overcharges on the 32 days between May and October 1980, the district court found that there was a factual dispute with regard to whether those overcharges were "knowingly" exacted. If "knowingly" collected, the overcharges were violations

of indisputably controlling law, i.e., §86 (this was pre-§86a), and, as such, usurious.

The jury was instructed with respect to the word "knowingly" (App. A46-48, A57-58). The instruction is consistent with knowledge required on the part of one acting with a general (as opposed to a specific) intent to do that which was done. The jury returned a verdict finding that respondent overcharged with requisite knowledge dictating liability for usury (App. A48).

Eighteen months after the jury's verdict that respondent acted with requisite knowledge, the district court ruled (App. A32-45), germane to the instant petition, reversing the jury's verdict and granting a JNOV (App. A25-26). The district court premised its reversal on: (1) that, effectually, petitioner had the burden of proving by a preponderance of the evidence the negative that the admitted overcharges were *not* a result of a mistake of fact and (2) petitioner did not refute the testimony of the executive of respondent that the overcharges were mistakes of fact and, therefore, failed to carry his burden to prove that the overcharges were "knowingly" made.[1]

The court of appeals affirmed the district court (App. A1-24). Isolating the language from the published opinion of the court of appeals which has bearing on this petition, the Court's attention is drawn to certain determinative language:

---

1. Respondent had argued before the jury and in post-trial motions what became known as its "undercharge" theory. Essentially, respondent claimed that it had undercharged petitioner during the same period when it had overcharged petitioner. This was advocated to be evidence of mistake and was presented to the jury for its consideration in determining whether respondent had "knowingly" overcharged. In its memorandum opinion (App. A32-45), the district court ruled that the undercharge theory of defense was legally impermissible. Respondent did not appeal nor cross-appeal from any aspect of the ruling of the district court, including the district court's determination that the undercharge theory of defense could not be made.

[W]alters failed to prove that the excess interest charge was knowingly charged. The only testimony on the issue was from the Bank's witness, . . . who admitted two periods of overcharges, but who testified that they . . . were inadvertent errors due to manual programming oversights. Walters presented no contradictory evidence tending to show that the *overcharges* were anything but *the result of* **negligence** (App. A8; see also A75). . . . [i]mplicit in this standard is that an honest mistake of fact, e.g., a mistake in computation, is not usurious (App. A12).

[W]alters presented no evidence of intent. The only evidence . . . was provided by the affidavit . . ., submitted to support the Bank's motion for summary judgment. In that affidavit, Mr. Dudley thoroughly and concisely explained how the overcharges and undercharges occurred. * * * [D]udley attributed the **errors** solely to **negligence** and **inadvertence** (App. A12).

In response, Walters presented no evidence tending to show that the **Bank acted** other than **negligently** or by mistake (App. A13). (emphasis added)

* * *

[d]istrict court properly rejected the jury's verdict for Walters and entered judgment NOV. The only testimony at the trial regarding the Bank's overcharge was that of Mr. Dudley. * * * [t]his evidence . . . at most **established negligence** on the part of the Bank, Walters presented no contradictory testimony or evidence. * * * However, this argument only permits one to conclude that the **Bank** was **negligent.** Viewing the case in a light most favorable to Walters, and drawing all reasonable inferences in his favor, there simply was an absence of proof of knowing

conduct by the Bank, an essential of usury under 12 U.S.C. §86 which Walters had the burden of proving 'convincingly.' (App. A23).

On the prime rate fraud question, the court of appeals stated:

> In order to state of valid RICO claim, a plaintiff must prove that the defendant committed an illegal predicate act. *See* 18 U.S.C. §1962. Walters relied on the federal mail fraud statute, ... [A]s stated by this court in *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984):
>
> > [T]he crime of mail fraud has two elements: a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. * * * This court has held that the scheme to defraud must involve:
> >
> > > [*I*]*ntentional* fraud, consisting in deception *intentionally* practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. [*A scheme to defraud*] *requires intent to deceive or defraud.* (citations omitted) This court has also held that the scheme to defraud must involve 'misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.' (citations omitted)
>
> There was no evidence that the Bank published a false rate. * * * Finally, there was no evidence that the Bank ever represented that the prime rate would be the lowest rate. . . . [t]here simply was an absence of proof of an intent to defraud, deception, or misrepresentations or omissions reasonably calculated to

deceive Walters as required for mail fraud (App. A14-17).

With respect to the breach of contract claim, i.e., that the overcharging of interest by respondent, if not usurious, was a breach of the loan contract, was addressed as follows:

> Walters also advanced the argument that even if the collection of interest in certain instances was not usurious, it nonetheless breached the contract because the maximum interest rate under his promissory note was limited by the usury laws in force as of May 3, 1979, the date he obtained the $475,000 loan and not as of the date the interest was collected. The plain language of the note is contrary to Walters' interpretation:
>
> > [p]rovided, always, however, that notwithstanding any changes in said prime rate, the *rate of interest hereon prior to maturity shall never be more than the maximum lawful contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge* **from time to time** . . . [a]nd, accordingly, in no event and upon no contingency shall the bank ever be entitled to receive, collect or apply as interest any interest . . . in excess of the maximum contract rate which may, **from time to time,** be lawfully charged to the maker hereof under the applicable law by a national bank having its principal place of business in the State of Tennessee. (emphasis theirs).
>
> Clearly, the Bank was not limited by the maximum rate in effect on the day of signing, but could charge interest limited by the rate ceiling and usury laws in

effect as they changed **from 'time to time.'** (App. A18-21).

With respect to whether §86a and its amendments, if applied to the subject loan, amounted to an unconstitutional impairment of contract, the court of appeals stated:

> [5] . . . : [I]nsofar as Walters argues that this federal legislation, which preempted state usury ceilings and granted interest rate relief to banks during and after 1980, constitutes an unconstitutional impairment of the contract, we note that no court has ever declared these statutes unconstitutional. Moreover, the contract Walters signed expressly contemplated that the interest rate charged and allowed by law would or could fluctuate **from 'time to time,'** which negates his contention that the rate in effect on the date of signing of the contract was the maximum rate that could ever be charged (App. A22).

With respect to whether §86a and its amendments were even applicable to the subject loan, the court of appeals refused to review the contention with the following (factually erroneous) words:

> [5] Walters superficially challenges the district court's construction of Pub. L. No. 96-221 and Pub. L. No. 96-399 in its appellate brief by simply referencing its trial memorandum (App. A21-22).

In the petition to rehear before the court of appeals, petitioner detailed how and why an observation that the challenge of petitioner was "superficially" made was incorrect and that everything petitioner wished to be considered, in fact, appeared in the four corners of petitioner's reply brief (App. A105-111). In short, petitioner, in its opening brief, did nothing more than draw attention to the fact that petitioner did not concede, in

the district court, that the subject statutes were applicable but contended (App. A74) to the contrary and made his position known to the district court in writing. However, in respondent's answering brief, respondent devoted ten pages (App. A96-104) in an effort to convince the court that the subject statutes were applicable and governed, essentially attempting to refute any mistake of law contention.

REASONS FOR GRANTING WRIT

It is notable that this Court, since 1959, has addressed the subject of the federal usury law only once and, then, only restated that the usury ceiling for national banks is that of the state in which the bank is "located." However, the specific question at hand in that case was one not pertinent to the instant inquiry, i.e., what the word "located," used in 12 U.S.C. §85 means. *Marquette National Bank of Minneapolis v. First Omaha Service Corporation*, 439 U.S. 299 (1978). There remain questions with respect to federal usury laws which are of universal impact on the economy. These questions involve billions upon billions of dollars of transferred gross national product on an annual basis.

In 1979, the Nation was faced with what was stated to be an economic crisis directly related to the interrelationship between interest rates and inflation. The banking community brought to bear all of the clout it could muster on Congress demanding excusal from usury laws. The result was the enactment of 12 U.S.C. §86a by which Congress, carte blanche, zapped out of existence state statutes and constitutional provisions relating to usury ceilings.

The legislative history (S. Rep. No. 96-368, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News

236; 125 Cong. Rec. 29,911, 30,610, 31,309-31,310, 31,320-31,327 (1979); 126 Cong. Rec. 6,965-6,984, 7,062-7,074 (1980); S. Rep. No. 96-736, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News 3506; 126 Cong. Rec. 16,112, 22,668 (1980); S. Rep. No. 96-423, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News 2584; 125 Cong. Rec. 35,267-35,268, 36,394-36,397, 36,404-36,405, 36,613-36,616, 36,903-36,906) of §86a reveals a situation where Congress acted at almost a panic pace. What is particularly revealing is that even Congress expressed serious doubt with respect to the constitutionality of §86a and its amendments but passed it anyway. Presumably, the thought was that, if the laws are unconstitutional, the courts will swiftly react, and Congress can adjust accordingly. As it turned out, there is no evidence that any court ever reviewed or passed on the constitutionality of §86a or its amendments. When the court of appeals below noted that no court had ever declared the statutes to be unconstitutional, it failed to mention that there is no evidence that any court ever even considered the question.

The areas of constitutional concern to Congress were of no small moment. The first (and most talked about) involved whether it was within the power of Congress to so summarily reduce to nothingness state laws and state constitutional provisions. The less talked about but equally pressing question involved what right Congress had to so summarily reduce to nothingness valid and existing contracts between borrowers and lenders.

When Congress passed §86a, it showed special deference to state constitutional provisions by postponing the applicability of the preemption legislation in states where constitutional provisions governed interest rate ceilings (App. A62-63). Also, as initially enacted, §86a preempted

state statutes only prospectively and, thereby, avoided the impairment of contract problems (*id.*). However, in March and October 1980, Congress enacted amendments to retrospectively apply §86a to loans initially made prior to its passage.

The claim of petitioner that the amendments to §86a were not applicable to the subject loan rests solely on the fact that respondent is located in Tennessee, and Tennessee was/is a state where the maximum rate of interest is controlled by a constitutional provision. *Tennessee Constitution,* Article 11 §7. Because loans made by national banks located in such states were treated differently from loans in states where no such constitutional provisions existed, petitioner has always contended (App. A89-93) that proper interpretation of the amendments to §86a exclude the subject loan.

If petitioner is correct, there exists no further question with respect to the $25,000 interest charge over and above what otherwise concededly would have been the usury ceiling. The district court first ruled with petitioner and then against petitioner on the statutory interpretation question, and the court of appeals simply refused to address the subject. There is no precedent.

The thought that, since the questioned legislation has expired itself out of existence, there could be no question of sufficient magnitude to require this Court's attention dissipates under examination. There is no assurance that the economy will not, again, be visited by the economic terrors of inflation with another interest rate "crisis." In fact, the fear is ever-present and based on reality. There is hardly doubt that Congress will be pressured, someday, by the banking industry for repeal of usury ceilings. Considering the options available to Congress in the next "crisis," the natural inclination will be to use the unre-

viewed statutes represented by §86a and its amendments. Though Congress recognized that §86a, as amended, was constitutionally dubious, it has survived to now without judicial review.

Upon passage of §86a and its amendments, untold billions of dollars were forcefully transferred from the Nation's business and agricultural borrowers to the Nation's business and agricultural lenders.

Arguably, the reason for no judicial review of legislation like §86a and its amendments is that the most directly and negatively impacted part of society is the small business borrower, and he is the most directly dependent on banking relationships for survival. Therefore, as long as such a borrower continues to exist, particularly in a tenuous economy, legal action against his lender is out of the question. Additionally, the small business borrower who is economically crushed is in no condition to seek relief against his lender and, as far as there ever being a future for such a small business borrower, he tends to fear, with reason, that an action against his lender would make impossible any opportunity to establish an essential line of credit necessary to re-establish a new business in better times. Because of these practicalities, the system for judicial review of constitutionally infirm legislation such as §86a experiences break down.

The likelihood that there is (or ever again will be) in the judicial review pipeline, at this stage, any case other than the present one which would present this Court with opportunity to review the constitutional soundness of §86a and its amendments, as an obvious matter of practicality, is remote. Yet, whether or not §86a and its amendments stand as constitutionally permissible solutions to an interest rate "crisis" or not is a question which has immense ramifications of **present** extreme importance.

For example, the lurking possibility that a business borrower might again face a statute like §86a and its amendments is of considerable importance in a small business borrower's **present** decision with respect to how much to borrow and under what terms and conditions. Likewise, knowledge on the part of business borrowers and business lenders today that the solution evidenced by §86a and its amendments cannot be re-effectuated because of constitutional provisions can markedly shape **present** lending practices.

Perhaps of even more importance, however, is the entitlement of the general public which must exist in the context of prevailing economic conditions to have Congress rightly informed by this Court the next time it faces the necessity to address an interest rate "crisis."

There is a uniqueness about this opportunity to review which makes it particularly appropriate as the vehicle by which this Court should speak. That is, statutes of limitation have run on any similar claims which, perhaps, could have been made in years passed. Therefore, were this Court to rule that §86a and/or its amendments failed to meet constitutional standards, the salutary effects (no matter which way this Court ruled) of such a ruling could be felt prospectively without disruption of existing contracts.

The court of appeals latched onto the **"from time to time"** language in the loan contract as its basis for holding that petitioner agreed that the maximum chargeable interest was the maximum the law allowed, on the date of *collection* rather than the date on the contract. This reasoning supports the conclusion that, even if §86a and its amendments created an unconstitutional impairment of some contracts, it did not impair the subject contract.

Respectfully, this reasoning errs in that it lifts language out of context and gives it a meaning which, when read in context, has a materially different meaning. The loan contract explicitly incorporates, by reference, 12 U.S.C. §85 (pre-amendment) and the Tennessee statute which §85 adopts, by reference, creating an 18% usury ceiling. All §85 does is state that the maximum amount chargeable is the maximum allowable under the Tennessee law.

By this language, petitioner contracted, on May 3, 1979, that respondent would never charge a rate in excess of the usury ceiling fixed by Tennessee. But, Tennessee law never changed; thus, there never existed a time when, according to the loan contract, respondent could charge petitioner more than 18%.

While the language might have anticipated some change in the maximum allowable rate, it was a change in Tennessee law enacted by the Tennessee General Assembly. It defies all reason to suggest that petitioner, on May 3, 1979, agreed that, if federal law intervened to obliterate the Tennessee law, petitioner would, then, be contractually bound by whatever Congress might enact.

Further attention to the context of the "from time to time" language yields an even more plausible meaning. That language appears in that part of the contract known as the self-protection clause by which respondent seeks to protect itself from ever being considered to have intended to enter into a usurious contract. The object of the language is to give respondent an out if it collects more interest than the law permits. Respondent protects itself by contracting, in advance, that it never intends, in the future, to collect more than the law might allow "from time to time" and that, if respondent does collect more, it can contractually substantiate an argument that, in so

doing, it did not intend so to do. The district court ruled that the self-protection language was unenforceable (App. A41-44). From this ruling, respondent neither appealed nor cross-appealed.

A somewhat subtle yet, upon study, clearly discernible ruling of the court of appeals constitutes law previously unknown to American jurisprudence and which upsets law at its most fundamental level. This ruling involves the 32 days of overcharges which the jury determined to have been knowingly exacted. That these were collections at a rate greater than permitted by governing law was admitted and is uncontestable. While the court of appeals affirmed the district court in overruling the jury's verdict that these charges were "knowingly" exacted, the court of appeals repeatedly stated that the overcharges were the result of respondent's negligence (supra p. 7).

There could hardly be any more sure violation of the terms of the loan contract than for respondent to collect an amount greater than respondent explicitly promised (App. A115) it would collect based on information known only to respondent (App. A72). There is no dispute that respondent did just that. This overcharge is a classic breach of contract, and nothing more need be asked.

Whether the overcharge was "knowingly" or inadvertently done could hardly be less material to whether there had been a pure and simple breach of the contract. The court of appeals repeatedly stated that the overcharge was the result of negligence. To negligently breach a contract certainly must be more egregious than to non-negligently breach a contract.

Without authority, the court of appeals ruled that the only way a national bank can be liable for breach of a loan contract, by overcharging interest, is to be guilty of "knowingly" overcharging. The court of appeals has ruled that

national banks are excused from the common law remedy of breach of contract, if the contract is a loan agreement and the breach is accomplished by collecting more interest than the national bank promised it would collect.

While a breach of contract by a lender overcharging interest does not yield to the borrower the statutory penalties for a usurious overcharge, damages as well as contract termination remedies afforded by the common law for breach of contract are of no small importance. However, by the ruling of the court of appeals, national banks are given license to overcharge interest in violation of a loan contract without being responsible for damages and without jeopardizing continuation of the loan contract so long as the lender can produce a witness to say that the overcharging, though it may have been repeated on more than thirty different occasions, was merely the product of negligence.

Though this Court has stated in dictum, which has become accepted as law, that interest overcharges because of the bank's erroneous, albeit good faith and plausible, interpretation of the law [as is equally true in other areas of the law: *United States v. Powell,* 513 F.2d 1249, 1251 (8th Cir. 1975); *United States v. Wood,* 446 F.2d 505, 507 (9th Cir. 1971); *United States v. Thaggard,* 477 F.2d 626, 631-632 (5th Cir. 1973)] will not excuse resultant usury [*The Bank of the United States v. Waggener,* 9 L.Ed. 163 (1835); *Lloyd v. Scott,* 7 L.Ed. 833 (1830), both of which are cases to determine whether the transactions were or were not "loans"] and although this Court has ruled that it is impossible for an overcharge of interest to be excused as *de minimis non curat lex* [*Citizens National Bank of Kansas City v. Donnell,* 195 U.S. 369 (1904) where $14.51 was overcharged on a $20,000 loan; see also *McCollum v. Hamilton National Bank,* 303 U.S. 245, 247 (1938)] and although this

Court has recognized the statutory provision that an interest overcharge must be "knowingly" exacted in order for usury to exist, this Court has never explicitly ruled with respect to the quality of the required knowledge.

It would seem that the explicit holding of this Court in *Lloyd v. Scott,* supra, that usury is a *malum prohibitum* act would leave beyond further inquiry whether the knowledge required was of a general or a specific kind [*United States v. Freed,* 401 U.S. 601, 607 (1971); *United States v. Dotterweich,* 320 U.S. 277 (1943); *United States v. Baliant,* 258 U.S. 250 (1922); *United States v. Park,* 421 U.S. 658, 668-674 (1975)] the courts below apparently overlooked the implication.

The knowledge requirement utilized below imposes a standard which makes it necessary to find that, not only did respondent do what it did knowing that it had done it, but for the lender to additionally know that doing what it knew it had done was usurious. This approach to the knowledge requirement of §86 reduces to meaninglessness the pronouncements by this Court explicitly holding that usury is a *malum prohibitum* act and that the usury risks of the consequences of conduct knowingly engaged in by the lender remain squarely with the lender.

The law concededly recognizes an honest mistake of fact as negation of requisite knowledge to violate §86. But, the law has been extremely careful to circumscribe what constitutes an "honest mistake of fact" because to allow the mistake of fact defense to become a catch-all would reduce to effective nothingness the exceedingly important precept that usury is a *malum prohibitum* act. If unguarded, the "honest mistake of fact" defense, though traveling under a different name, becomes, *in esse,* the fast track to a specific intent requirement which converts usury from a *malum prohibitum* act to a *malum in se* act.

A leap of this magnitude completely flips all established law, and the order of things protected by it, on its head.[2]

As indicated by the authorities in footnote 2, the honest mistake of fact which the law has taken pains to avoid expanding is of two kinds which have been dubbed as (1) a scrivener's error and (2) a mistake in computation. The **scrivener's error is** one where correct information is known and intended to be recorded but, without any knowledge of having so done, incorrect information is recorded and, because of the incorrect information, more is charged than was intended to be charged. The **computation error is** one where, intending so to do, the right numbers are recorded but, without any knowledge that such has been done, the wrong total, product or quotient is calculated, e.g., a "2" is rightly recorded to be added to a "3" which has been rightly recorded but, without the knowledge of the lender, the rightly

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2. The following is a list of citations, from among hundreds available, selected because of the discussion in each articulating clearly each aspect of the general law on the subject:

Consumer Usury and Credit Overcharges, (National Consumer Law Center) §2.2.6 pp. 10-11; 47 *C.J.S.*, Interest and Usury, §120, p. 223; 14 *Williston, Contracts* (1972 Ed.) §698 pp. 795-801; Comyn, *Law of Usury* p. 7; *Dickey v. Bank of Clarksdale*, 184 So. 314, 317 (Miss. 1938); *Vee Bee Service Co. v. Household Finance Corporation*, 51 N.Y.S.2d 590, 611 (N.Y. S.Ct. 1944); *Muir v. Newark Sav. Inst.*, 16 N.J.Eq. 537, 539; *Ford Motor Credit Co. v. Catalini*, 383 S.W.2d 99, 101 (Ark. 1964); *Holland v. Doan*, 307 S.W.2d 538, 540 (Ark. 1957); *Jefferson Standard Life Ins. Co. v. Davis*, 163 So. 506, 507 (Miss. 1935); *Hebron Bank v. Gambrell*, 77 So. 148, 149 (Miss. 1918); *Atlas Realty Corporation v. House*, 192 A. 564 (Conn. 1937); *Fisher v. Bethesda Discount Corporation*, 157 A.2d 265, 269 (Md. App. 1960); *Cotton v. Commonwealth Loan Co.*, 190 N.E. 853, 856 (Ind. 1934); *Pyler v. McGee*, 57 S.E. 57, 58 (S.C. 1907); *Rossberg v. Hosesapple*, 260 P.2d 563, 566 (Utah 1953); *Lloyd v. Scott*, 7 L.Ed. 833, 839 (1830); *Dupree v. Virgil R. Coss Mortgage Co.*, 267 S.W. 586, 589 (Ark. 1925); *Kessing v. National Mortgage Corporation*, 180 S.E.2d 823, 827-828 (N.C. 1971); *Dreyfus Company, Inc. v. Tim Wargo and Sons, Inc.*, 668 S.W.2d 957 (Ark. 1984); *Teshner v. Roome*, 212 P. 473, 475 (Ore. 1923).

recorded numbers are totalled to be "6." No other types of mistake have ever been recognized as sufficient to negate a finding of requisite knowledge. The most probative evidence that an overcharge is not a mistake has been held to be failure to make a correction when the overcharge is brought to the lender's attention (App. A79-80). *Holland v. Doan,* 307 S.W.2d 538 (Ark. 1957).

Perhaps the most illustrative clarification of the differentiation can be found in *Ford Motor Credit Company v. Catalini,* 383 S.W.2d 99, 100-101 (Ark. 1964). There, the responsible employee added the figures put down but claimed mistake of fact because he inadvertently selected the wrong chart from which to obtain the numbers written down. It was not contested that the clerk intended to use the right chart or that the mistake in selecting the wrong chart was not one made in good faith. The court found that the mistake in that case was not a mistake of the kind required in order to excuse the overcharge from classification as usury and discussed what it takes to be an excusing mistake.

The reason underlying the ruling in *Catalini* is that the numbers intended to be written down were knowingly written down (i.e., there was no scrivener's error) and, once written down, the numbers were correctly combined and, accordingly, the right mathematical result was reached using numbers knowingly intended to be used in calculating (i.e., there was no mathematical calculation error). The type of errors claimed by the lender and rejected by the court in *Catalini* as insufficient to excuse a finding of usury are precisely the kind of errors accepted by the courts below as sufficient to excuse a finding of the requisite knowledge to violate §86.

The policy implications of the rulings of the courts below are quite significant. In short, the rulings **shift to**

the borrower all of the risk of being overcharged interest because the lender has chosen to operate understaffed, with incompetent employees, with inadequate equipment or with outdated systems relative to the workload demands. There is a very real sense in which, under the precedent set by the rulings below, a borrower, before being able to make an intelligent borrowing decision, must be fully advised of not just what the lender charges as interest but of the competence of the lender's personnel and adequacy of the lender's systems.

This is of critical importance in modern times when business borrowing customarily is by use of a fluctuating interest rate which varies according to a standard (e.g., the prime rate of the lender) which is known only (App. A72) to the lender. If the ruling of the courts below is acceptable precedent, courts will be required to re-evaluate rulings explaining the statutory provisions in the Truth-In-Lending Act [15 U.S.C. §1601 et seq.], where the lender/seller retains full responsibility for mistakes similar to those held below to excuse overcharged interest.[3] The rationale in those cases could hardly be more applicable to the present subject. From a societal standpoint, it would be unwise to remove the pressure of present law which forces national banks to be efficient or fail so to do at their own **risk** which the law will not permit to be **shifted** to a helpless small business borrower.

Another error in the ruling below has major society-wide impact, reversing all known law on the subject and

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3. *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 279-282 (S.D.N.Y. 1971); *Buford v. American Finance Co.*, 333 F.Supp. 1243, 1247-1248 (N.D. Ga. 1971); *Ives v. W.T. Grant Co.*, 522 F.2d 749, 757-758 (2nd Cir. 1975); *Johnson v. Associates Finance, Inc.*, 369 F.Supp. 1121, 1123 (S.D. Ill. 1974); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *Welmaker v. W.T. Grant Co.*, 365 F.Supp. 531, 544 (N.D. Ga. 1972); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165-1167 (7th Cir. 1974); *Baker v. G.C. Services Corp.*, 677 F.2d 775, 779 (9th Cir. 1982).

reducing to effective nothingness a rule of universal application, but one which this Court is yet to directly address. The courts below excused respondent, a multi-billion dollar national bank, **as an entity** because they considered that petitioner had failed to identify a specific individual who, while acting as an agent for respondent, possessed what they considered sufficient knowledge and/or intent for those individuals to have had personal liability had those been persons responsible under the law and had been individually charged (supra p. 8; App. A41-42).

Where the knowledge and/or intent of an entity, **as an entity,** must be determined, the question is not whether, or what, any particularly identified individual within the entity knew and/or intended but what the entity knew and/or intended. Even an acquittal or specific finding of no wrongdoing by the employee who engaged in the conduct does not insulate the entity from even criminal liability.[4]

The relevant knowledge of respondent is the collective knowledge of all of its employees and the content of its records. The fact that no one individual agent of respondent has a sufficient quantum or quality of knowledge to have supported culpability, were there no other knowledge, is irrelevant.[5] Continuous conduct, established as a

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4. *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2nd Cir. 1962), cert. denied, 371 U.S. 969 (1963); *United States v. Young Brothers,* 728 F.2d 682, 688 (5th Cir. 1984); *American Medical Association v. United States,* 130 F.2d 233, 252 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943); *United States v. General Motors Corporation,* 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941); *United States v. Austin-Bagley Corp.,* 31 F.2d 229, 233 (2nd Cir. 1929), cert. denied, 279 U.S. 863 (1929).

5. *United States v. T.I.M.E.-D.C., Inc.,* 381 F.Supp. 730, 740-741 (W.D. Va. 1974); *Inland Freight Lines v. United States,*

(Continued on following page)

course of the business, is a sufficient basis to irrebuttably presume that corporate officers were informed.[6]

A misrepresentation by an entity agent who lacked even a reason to believe that what was represented was not, in fact, true leaves the entity liable if, within the ken of the entity, there exists information which would make the representation a knowing misrepresentation.[7] Because the court below made much of the fact that individuals within respondent "believed" (App. A84) what they were doing was "right," it should be noted that prior authority reduces this "belief" to an irrelevancy.

In *Slater v. Missouri Edison Company*, 245 S.W.2d 457, 460 (Mo.App. 1952), it was conceded that the trespassing agent of the corporation "believed" that the property on which he traversed was owned by the corporation. The court held that this is no defense. The corporation's "honest mistake" defense was rejected because there were other employees of the corporation who knew. The fact that an employee acts on an honest belief that what he does is permissible does not mean that his corporate employer gets the advantage of the good faith belief.

Footnote continued—

191 F.2d 313, 315 (10th Cir. 1951); *United States v. Sawyer Transport, Inc.*, 337 F.Supp. 29, 30-31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972); *Alabama Power Company v. McIntosh*, 219 Ala. 546, 551, 122 So. 677, 681 (1929).

6. *People v. Canadian Fur Trappers Corporation*, 248 N.Y. 159, 161 N.E. 455, 458 (1928); *Grant Brothers Construction Company v. United States*, 13 Ariz. 388, 114 P. 955, 957 (1911), aff'd, 232 U.S. 647 (1914); *American Socialists Society v. United States*, 266 F. 212 (2nd Cir. 1920), cert. denied, 254 U.S. 637 (1920).

7. *Gem City Motors, Inc. v. Minton*, 109 Ga.App. 842, 845, 137 S.E.2d 522, 525 (1964); *Paloeian v. Day*, 299 Mass. 586, 591, 13 N.E.2d 398, 401 (1938); *Sarna v. American Bosch Magneto Corp.*, 290 Mass. 340, 343, 195 N.E. 328, 330 (1935).

Given public policy,[8] the law tilts the scales in favor of the public welfare. *Shirley v. Shirley*, 181 S.W.2d 346, 347-348 (Tenn. 1944); 17 C.J.S., Contracts, §201 p. 1001.

Where the public welfare is involved, **corporations as entities apart from their employees, have a non-delegable duty to supervise agents** to protect the public. The leading authority is *State v. Louisville & Nashville Railroad*, 91 Tenn. 445, 19 S.W. 229 (1892). Ironically, the court of appeals below conclusively adopted the reasoning in *United States v. Armour & Company*, 168 F.2d 342, 344, n.2 (3rd Cir. 1948) in ruling consistently with those courts but departed from its own precedent in the instant case. *Continental Baking Company v. United States*, 281 F.2d 137, 151 (6th Cir. 1960). The rule has wide acceptance[9] and applies even if criminal mens rea is invoked. *United States v. Harry L. Young & Sons*, 464 F.2d 1295, 1287 (10th Cir. 1972). An objective impossibility prohibiting adequate supervision will not excuse liability.[10]

The courts below read only the self-serving and exonerating comments from two of respondent's responsible executive employees, and petitioner was left with this excerpt of testimony as the end-all on the subject of respondent's knowledge even though that very testimony

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8. *Caldwell & Company v. Lea*, 152 Tenn. 48, 272 S.W. 715 (1925); *Nashville Bank v. Hays*, 9 Tenn. 243 (1829); *Lawrence v. Morrison*, 9 Tenn. 444 (1830); *Dews v. Eastham*, 10 Tenn. 463 (1830).

9. *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States v. Cadillac Overall Supply Company*, 568 F.2d 1078, 1090 (5th Cir. 1978), cert. denied, 437 U.S. 903 (1978); *Dollar S. S. Company v. United States*, 101 F.2d 638, 640 (9th Cir. 1939); *United States v. Thompson-Powell Drilling Company*, 196 F. Supp. 571, 574 (N.D. Tex. 1961); *United States v. Kemmel*, 160 F.Supp. 718, 720 (M.D. Penn. 1958).

10. *United States v. Y. Hata & Company*, 535 F.2d 508 (9th Cir. 1976), cert. denied, 429 U.S. 828 (1977); *United States v. Stern*, 535 F.2d 512 (9th Cir. 1976).

established admitted conduct (App. A111-114; A125-134) which proves facts which, when proven in all other like and similar cases, have always yielded liability on the part of the suspect entity.

The jury, firsthand, heard the proof offered through the two executives and, after proper and unchallenged instruction on the law, found the proof from the two executives to convince that respondent, as an entity, was liable. In practical effect, the rulings below make it impossible for a borrower to prove that a national bank is liable for usury under §86; therefore, again, in terms of practical effect, the rulings below judicially repeal §86.

The prime rate fraud claims of petitioner were lost to a directed verdict because the district court, affirmed by the court of appeals, applied standards with respect to the **intent required to violate the mail fraud** statute which are inconsistent with the law.

The district court explicitly articulated that the term "prime rate" was "unfair" to petitioner, created problems in that it was impossible for any borrower to "figure out" what the prime rate was from the loan contract In spite of this, the district court directed a verdict, on the premise that it was impossible for petitioner to prove mail fraud, because the one responsible must have a "criminal intent to violate the law" which was as "something wicked, unlawful and deliberate" and an "intent to deceive" and an **"intent to injure"** (App. A83-85).

The district court complicated this ruling by holding that petitioner must prove not just that respondent, as an entity, possessed the requisite intent but that specifically identified agents of respondent, individually and personally, acted with such an intent. The district court explicitly held that, if the respondent's responsible agents were "men [who] thought they were doing the right

thing" and/or believed they were "supposed to" do what they did, it becomes impossible to prove that respondent, as an entity, had the necessary intent to violate the mail fraud statute (App. A84).

The court of appeals let stand the ruling of the district court and stated little more than a truism, without further explanation, that mail fraud requires "intentional fraud" which is "intentionally practiced" and which "requires intent to deceive" (App. A14).

This Court, since 1959, has handed down rulings with respect to various aspects of mail fraud on five separate occasions[11] and, in a seminal ruling, once in times passed in *Durland v. United States,* 161 U.S. 306 (1896). One of the more recent cases is of particular importance here. This Court passed up the opportunity to rule on this subject in that case because the proof supported the more rigorous intent conceptualization; thus, nothing this Court could say on the subject would change the result in that case. However, important here is the language where this Court stated as follows in *United States v. Lane,* 474 U.S. 438 (1986) at 453:

> [17] The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a **general intention** on their part **to defraud,** in order to come within *Sampson's* holding. We need not determine whether any such **specific intent** must be shown, as we agree with the Court of Appeals that there was sufficient

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11. *McNally v. United States,* 483 U.S. ....., 107 S.Ct. ....., 97 L.Ed.2d 292 (1987); *United States v. Lane,* 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986); *Mariscal v. United States,* 449 U.S. 405, 101 S.Ct. 909, 66 L.Ed.2d 616 (1981); *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *United States v. Sampson,* 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960).

evidence for the jury to infer **specific intent** to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-appeal.

In the instant case, unlike the *Lane* case, petitioner was denied the opportunity to have the evidence considered by the jury because of the clearest possible ruling of the district court that the most rigorous standards for specific criminal intent on the part of identified agents of respondent was not, in the opinion of the district court, shown by the proof. This issue would not seem capable of being more clearly crystalized and appropriate for ruling by this Court than as is presented by this case.

The question of the kind and quality of intent, if any at all, required to be liable for mail fraud is one of importance and to which society is in need of a soon answer. The problems created by not having an answer are growing in volume and intensity. The statistics clearly indicate that mail fraud is one of the, if not the most, frequently used statutes to support criminal prosecutions in the federal courts.[12] Added to this is the modern-day reality that mail fraud is used as the predicate offense in many, if not most, civil RICO claims. At present, there is a diversity of interpretations among courts at all levels and, even, within the various circuits.

This Court, in 1878, left it without doubt that the mail fraud statute made criminal conduct other than common law fraud and had elements less rigorous than common law fraud. Though somewhat slow in coming, this precept is taking on new prominence because, among other reasons, mail fraud is gaining even wider usage than in the past. A recapitulation of the diverse au-

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12. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duq.L.Rev. 771 (1980); Hurson, *Limiting the Federal Mail Fraud Statute - A Legislative Approach*, 20 Am.Crim.L.Rev. 423 (1983).

thority on this subject was recently published in the opinion and dissenting opinion in *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 530-534 (9th Cir. 1987). Also see *Deaver v. United States,* 155 F.2d 740, 744 (D.C. Cir. 1946) saying: "Similarly, a 'scheme' may be fraudulent though no misrepresentation is made." [citing *Kaufmann v. United States,* 282 F.2d 776 (3rd Cir. 1922), cert. denied, 260 U.S. 735 (1922)].

Likewise, see the thoughtful analysis in *United States v. Frankel,* 721 F.2d 917 (3rd Cir. 1983) saying at 921: "Schemes to defraud come within the scope of statute even absent a false representation."

Another informative recent statement appears as follows in *Armco Industrial Credit Corporation v. SLT Warehouse Company,* 782 F.2d 475 (5th Cir. 1986) at 481: "By confusing mail fraud with common law fraud, SLT's argument falls wide of the mark. . . . [T]o find a violation of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed representations (citation omitted). Indeed, the intended victim need not even have been defrauded for liability to attach under the mail fraud statute." (citation omitted).

It is equally well established that the mail fraud statute imposes some affirmative duty on the part of one making representations. That is, a person who, though confused, ignorant or mistaken about information, makes a representation about the subject concerning which he is confused at his own risk and, if what is represented deceives or has the potential to deceive or mislead, the recklessness of the person making the representation is taken as sufficient to establish intent. *United States v. Dick,* 744 F.2d 546 (7th Cir. 1984).

The court of appeals below has recently restated the very often repeated rule that a person uses the mail to

further any conduct which is not morally upright, irrespective of the form or the way in which such conduct manifests itself, is a violation. *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985).

Innumerable cases use the term "specific intent" to describe the kind of intent which must be proven. However, in further explanation of what is meant by "specific intent," when so used, courts often provide a definition which makes the intent described more akin to general intent than specific intent. Typical of this is *Schreiber Distributing Company v. Serve-Well Furniture Company*, 806 F.2d 1393 (9th Cir. 1986).

In short, the question of what intent and how much of it is required by whom to violate the mail fraud statute is becoming more and more confused instead of more and more clarified. Only this Court can resolve this many-times recurring question, and, thereby, save hundreds upon hundreds of judicial hours.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 1989

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88-1185

No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM S. WALTERS, JR.,
Petitioner,

vs.

FIRST TENNESSEE BANK,
N.A. MEMPHIS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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138 pp

INDEX TO APPENDIX

Opinion of the United States Court of Appeals, Sixth Circuit in *Walters v. First Tennessee Bank, N.A. Memphis*, 855 F.2d 267 (6th Cir. 1988) A1

Judgment of United States District Court, Western District of Tennessee, Western Division (Filed August 15, 1986) A25

Order Directing Entry of Judgment in United States District Court, Western District of Tennessee, Western Division (Filed August 15, 1986) A28

Ruling on Post-Trial Arguments and Motions in United States District Court, Western District of Tennessee, Western Division (Filed June 4, 1986) A31

Civil Docket Continuation Sheet A46

Trial Transcript Excerpts A49

Order of United States Court of Appeals, Sixth Circuit (Filed October 14, 1986) A59

Pertinent Statutes A60

Opening Brief of Appellant, William S. Walters, Jr. A67

Appellant's Petition to Rehear A86

Joint Brief of Appellee, First Tennessee Bank N.A. Memphis A94

Reply Brief of Appellant, William S. Walters, Jr. A105

Promissory Note A115

Constitutional Provisions and Statutes Involved A120

Response of Walters to First Tennessee Motion to Dispose of Pending Motion for Summary Judgment, and to Apply Collateral Estoppel to Usury Issues in Cause Nos. 82-2391-H and 82-2783-H A125

APPENDIX

William S. WALTERS, Jr.,
Plaintiff-Appellant,
v.
FIRST TENNESSEE BANK, N.A. MEMPHIS, et al.,
Defendants-Appellees.

Nos. 86-6031 to 86-6033.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 8, 1987.
Decided Aug. 16, 1988.
Rehearing Denied Oct. 14, 1988.

Borrower brought action individually and for himself and other shareholder of corporation against bank in connection with loans extended by bank to borrower personally and to corporation, alleging usury, breach of contract, and fraudulent conduct in violation of federal racketeering statutes. The United States District Court for the Western District of Tennessee, McRae, J., entered judgment in favor of bank, and borrower appealed. The Court of Appeals, John W. Peck, Senior Circuit Judge, held that: (1) borrower could not recover from bank under federal usury statute; (2) bank did not perpetrate fraud or breach loan agreement by charging borrower and borrower's corporation announced public prime rate that was higher than unannounced lower rate charged to other short-term borrowers; and (3) under Tennessee

law, note bearing variable interest rate was not too indefinite to be enforceable.

Affirmed.

1. Federal Courts (Key) 616

Issue of whether statute of limitations had been tolled with regard to usury claim could not be raised for first time on appeal. National Bank Act, 12 U.S.C.A. § 86.

2. Bankruptcy (Key) 2395
Limitation of Actions (Key) 110

Shareholders' derivative action against bank in which usury claim was raised and bankrupt corporation was named as nominal defendant was not action against debtor's estate subject to Bankruptcy Code's automatic stay provision, so that two-year limitations period applicable to usury claim was not tolled. National Bank Act, 12 U.S.C.A. § 86; Bankr.Code, 11 U.S.C.A. §§362, 362(a)(1), (c)(2).

3. Banks and Banking (Key) 181

Evidence was insufficient to establish that bank violated federal usury statute, absent showing that overcharges on side notes secured by preferred ship mortgage were intentional, rather than as result of miscalculation caused by changes in federal discount rate. National Bank Act, 12 U.S.C.A. §§ 85, 86; Ship Mortgage Act, 1920, 30, Subsec. H, 46 U.S.C.A.App. § 926.

4. Banks and Banking (Key) 100, 181

Bank did not perpetrate fraud or breach loan agreement by charging borrower and borrower's corporation

announced public prime rate that was higher than unannounced lower rate charged to other short-term borrowers; bank presented evidence that certain categories of loans were routinely excluded in industry in determining bank's prime rate, and there was no evidence that bank ever represented that prime rate would be lowest rate it offered. 18 U.S.C.A. §§ 1341, 1962.

5. Bills and Notes (Key) 28

Under Tennessee law, note bearing variable interest rate was not too indefinite to be enforceable; interest rate was set according to fluctuation in prime rate, was redetermined as rate changed, and applied to all similarly situated bank customers.

6. Banks and Banking (Key) 181

Maximum interest under note bearing variable interest rate was not limited by usury laws in force as of date borrower obtained loan from bank, but rather was limited by usury laws on date interest was collected; terms of note permitted bank to charge interest limited by rate ceilings and usury laws in effect as they changed "from time to time." National Bank Act, 12 U.S.C.A. § 86.

7. Banks and Banking (Key) 187

Evidence was insufficient to establish that bank intentionally overcharged borrower on his personal loan bearing variable interest rate, in violation of federal usury statute; evidence indicated that overcharges resulted when bank employee inadvertently failed to enter lower usury ceiling on computer when federal discount rate dropped. National Bank Act, 12 U.S.C.A. § 86.

Larry E. Parrish, Parrish & Shaw, Hal Gerber (argued), Gerber, Gerber and Agee, Memphis, Tenn., Lewie R. Polk, III, for plaintiff-appellant.

Leo Bearman (argued), Robert Mark Glover, Frank Glankler, Memphis, Tenn., for defendants-appellees.

Before NELSON and NORRIS, Circuit Judges, and PECK, Senior Circuit Judge.

JOHN W. PECK, Senior Circuit Judge.

This is an appeal from actions brought by appellant William Walters, Jr., individually and for himself and the other shareholder of Ten Tex Marine, Inc. ("Ten Tex") against appellee First Tennessee Bank ("the Bank") in connection with loans extended by the Bank to Walters personally and to Ten Tex, in which Walters was a 50% shareholder. The actions alleged usury, breach of contract, and fraudulent conduct in violation of federal racketeering (RICO) statutes. After various pre-trial orders and a directed verdict, only Walters' usury claim was considered by the jury. Although the jury found in Walters' favor, the district court entered a judgment notwithstanding the verdict for the Bank. For the reasons stated below, we affirm the judgment of the district court.

I.

Inasmuch as the factual background of this litigation is lengthy and complex, a relatively brief summary follows. More specific facts are detailed in the course of the discussion of the individual issues on appeal.

In May 1979 Walters obtained a personal loan for $475,000.00 from the Bank evidenced by a promissory

note which provided that the interest would be at a floating rate pegged to 130% of the Bank's prime rate. The loan was secured by a promissory note from Fischer Lime & Cement Co. ("Fischer"), of which Walters was the payee. When Walters later defaulted, the Bank asserted its right under the security agreement to receive payments from Fischer.

In 1979 Walters also negotiated with the Bank for loans to capitalize Ten Tex and to construct a port facility on the Mississippi River in Tennessee. Initially the Bank made several loans to Ten Tex, totaling $1,521,000.00, the principal loan being for $1,341,000.00 and containing interest rate provisions identical to that of Walters' personal loan. Two subsequent loans for $100,000.00 and $80,000.00 were made at 15% and 16% interest respectively. An agreement was also reached between Ten Tex and the Bank to finance the port facility project through the issuance of industrial revenue bonds.

In November 1979 the Industrial Revenue Bond Board of Shelby County, Tennessee issue $1,425,000.00 in bonds. When the bond issue closed in December 1979, Walters executed an industrial revenue bond indenture which transferred all of the assets of Ten Tex to the Industrial Revenue Bond Board. The Bank was appointed trustee to hold Ten Tex assets and to receive payments under a lease by which Ten Tex leased back the port facilities. The Bank purchased all of the bonds.

At the time the bond indenture was signed, the Bank advised Walters that certain pieces of marine equipment could not be financed under the bond issue until preferred ship mortgages could be executed on the equipment. Walters alleges that he was told that the needed

documentation could be accomplished in a matter of a few weeks and that the marine equipment could then be financed through the bond issue. In order to complete Ten Tex's capitalization pending the financing of all assets under the bonds, a $376,000.00 note (hereinafter "the side note") was executed by Ten Tex. The note was secured by marine equipment and was subject to the same interest rate provisions as the $1,341,000.00 note. The principal amounts on the $1,341,000.00, $100,000.00 loan, and $80,000.00 loan were retired with proceeds from the bond issue. The proceeds of the sale of certain items of marine equipment upon which preferred ship mortgages had been executed were applied to interest remaining on those loans.

In September 1980 Ten Tex was unable to make its lease payment of $152,166.66. The Bank terminated the lease and, as trustee, declared its intent to repossess the premises. The Bank also accelerated payment on the side note and Ten Tex declared bankruptcy. Ten Tex has alleged that on September 15, 1980, the Bank, as trustee, held more than $185,000.00 in bond issue funds which it could release, but did not release, to Ten Tex, a factor that heavily contributed to its bankruptcy.

In May 1982 Walters filed an action on his own behalf against the Bank under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, and under the National Bank Act, 12 U.S.C. §§ 85, 86. He also alleged pendent state claims for misrepresentation, breach of contract, and common law fraud. The gravamen of the complaint was that the Bank committed "prime rate fraud" by charging excessive and usurious interest on the $475,000.00 loan. In November 1982 Walters also filed a shareholder derivative action

on his own behalf and that of Ten Tex's other 50% shareholder. This action raised essentially the same claims with regard to the $1,341,000.00 loan, side note, and bond issue. An interpleader action was filed by Fischer in October 1982 in an effort to protect itself from multiple liability due to conflicting demands for payment by Walters and the Bank. Fischer's note payments were thereafter paid into the registry of the court.

In August 1984 the district court consolidated the three actions for trial. On September 20, 1984, the district court granted summary judgment in favor of the Bank on certain issues. The court ruled that the interest due on the $1,341,000.00 loan was paid on November 2, 1979, and thus any usury claim on that loan was barred by the two year statute of limitations set forth in 12 U.S.C. § 86. The bond issue was alleged to have been "tainted" because Walters claimed that Ten Tex paid not only the 9% bond rate of interest but also the underlying 15% and 16% interest on two of the notes during the period from November 1 to December 5, 1979; however, the court ruled that the undisputed affidavit of the trust officer of the Bank indicated that the 9% interest due on the bond issue was paid by the Bank, and thus no double interest was paid by Ten Tex. As for the claims concerning the $346,000.00 side note, the district court ruled that the statute of limitations had not run. The court determined, however, that that note was subject to a preferred ship mortgage; under the Preferred Ship Mortgage Act, such a mortgage "may bear such rate of interest as is agreed by the parties thereto." 46 U.S.C.App. § 926. The court ruled that the Preferred Ship Mortgage Act superceded the National Bank Act because

> [Section] 926 was intended to be the exclusive word on loans subject to preferred ship mortgages. The policy behind the P.S.M.A. was to encourage investment by lending concerns in a unique commercial area fraught with risk. A contrary holding, as urged by plaintiff, would contravene congressional policy and make lenders susceptible to a double interest penalty heretofore thought inapplicable.

The court also reasoned that in any event there could be no substantive usury violation of 12 U.S.C. § 86 because the essential element of intent was missing.

At jury trial in September 1985, the district court granted a directed verdict for the Bank on the RICO and fraud claims alleged in both lawsuits. The only remaining issue presented to the jury was whether the Bank knowingly charged Walters usurious interest on the $475,000.00 note. As noted above, the jury found in Walters' favor, but the district court entered judgment NOV for the Bank. The district court's decision was based on its finding that Walters failed to prove that the excess interest charge was knowingly assessed. The only testimony on the issue was from the Bank's witness, Charles Dudley, who admitted two periods of overcharges, but who testified that they (as well as certain undercharges) were inadvertent errors due to manual computer programming oversights. Walters presented no contradictory evidence tending to show that the overcharges were anything but the result of negligence.

Walters, on behalf of himself and as a shareholder of Ten Tex, timely appealed. Walters has raised numerous issues on appeal, which we will address *seriatim*.

II.

The Summary Judgment Order

[1, 2] Walters argues that the district court erred in dismissing the usury claim filed on behalf of Ten Tex in the derivative action. He urges that, contrary to the district court's conclusion, the usury claim on the $1,341,000.00 note was not barred by the two-year statute of limitations in 12 U.S.C. § 86 which governs such claims. Walters maintains that Ten Tex's filing of a Chapter 11 petition on September 30, 1980, triggered the automatic stay provision of 11 U.S.C. § 362[1] before the statute of limitations had run. He theorizes that since Ten Tex, the debtor, was a named party defendant in the derivative action, the automatic stay provision would have prohibited initiation of the derivative action until disposition of the bankruptcy case, which had not occurred as of November 1982. We reject Walters' contention. First, Walters did not raise this point before the district court. It is well established that where a plaintiff fails to assert in district court that the statute of limitations has been tolled, he cannot raise it for the first time on appeal. *Roberts v. Berry,* 541 F.2d 607, 610 (6th Cir.1976). Even if we were to reach the merits of the issue, we would determine that this is not "an action against the debtor" stayed by 11 U.S.C. § 362. As noted by the Bank, Ten Tex is merely a nominal defendant in the derivative action; the Bank is the party charged with usury. This is sufficient to take the deriv-

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1. 11 U.S.C. § 362(a)(1) establishes an automatic stay against the "commencement . . . of other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title." The stay continues until the earliest of the time the case is closed, is dismissed, or discharge is granted or denied. 11 U.S.C. § 362(c)(2).

ative action out of the scope of the automatic stay provision. *See, e.g., Price & Pierce Int'l, Inc. v. Spicers Int'l Paper Sales, Inc.*, 50 B.R. 25 (S.D.N.Y. 1985) (interpleader action, which named bankrupt debtor as defendant, was not subject to automatic stay, because the bankrupt was only a nominal defendant). *See also NLT Computer Services Corp. v. Capital Computer Systems, Inc.*, 31 B.R. 960, 961 (M.D.Tenn.1983), *vacated on other grounds*, 755 F.2d 1253 (6th Cir.1985).

[3] Walters also challenges the district court's ruling that the usury provisions of 12 U.S.C. § 85 and § 86 were not applicable to Ten Tex's side note. The district court determined that because the side note was secured by a preferred ship mortgage, the Preferred Ship Mortgage Act, 46 U.S.C.App. § 911 *et seq.*, not the National Bank Act, controlled. Because 46 U.S.C.App. § 926(d) provides that "a preferred mortgage may bear such rate of interest as is agreed by the parties thereto," the district court reasoned that the parties could agree to any rate of interest, even one which exceeded the limits of 12 U.S.C. § 85.

Walters argues that the district court erred in making this determination. He observes that the side note provided for "[a] floating rate which is equal to 130% of the Bank's prime rate and changes the same day that the Bank's prime rate changes, but such floating rate shall in no event exceed the maximum rate allowed by applicable law." Moreover, he stresses that preferred ship mortgages were not recorded on two vessels securing the note until several weeks or months after the loan was made and after the charging and receipt of interest occurred. Thus, Walters raises questions of significance in this regard. First, can the side note constitute a pre-

ferred ship mortgage and gain the protection of the Preferred Ship Mortgage Act, which has strict execution and recording requirements for preferred mortgage status, *see* 46 U.S.C.App. §§ 921, 922, when the preferred ship mortgages were not executed and recorded on vessels partially securing the side note until long after the note's execution? Second, even if the side note were controlled by the Preferred Ship Mortgage Act, does the note's above interest rate provision evidence an intent of the parties to be bound by applicable federal and/or state usury laws which can be incorporated by reference into preferred ship mortgages? *See C.I.T. Corp. v. M/V Miss Eileen*, 447 F.2d 761, 763 (5th Cir.1971). However, we need not reach these legal issues, which the district court apparently did not consider,[2] in light of our determination that the district court's alternative ground for dismissal was correct. The district court found with regard to both the side note and the $1,341,000.00 loan that there could be no possible substantive violation of 12 U.S.C. § 86 because Walters failed to show any evidence of intent, a requisite element of usury.

Section 86 provides a penalty for "[t]he taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section [12 U.S.C. § 85] *when knowingly done. . . .*" (emphasis added). The Ninth Circuit has held that the standard for determining intent under § 86 is that (1) the act of charging excess interest is intentional, and that (2) the bank knew its

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2. We note that Walters did not raise these particular arguments before the district court. He apparently agreed at that time that the Preferred Ship Mortgage Act was applicable to the side note; he argued that he did not agree to be overcharged interest and, therefore, that § 926 of the Preferred Ship Mortgage Act should not protect the Bank.

policy would result in receipt of more than the legal rate. *American Timber & Trading Co. v. First Nat'l Bank of Oregon*, 690 F.2d 781, 788 (9th Cir.1982). We find this standard helpful. Implicit in this standard is that an honest mistake of fact, e.g., a mistake in computation, is not usurious. *See, e.g., White v. Kaminsky*, 196 Tenn. 180, 185, 264 S.W.2d 813, 815 (1954). *See also* cases collected at 51 A.L.R.2d 1087.

Our review of the record shows that the district court properly found that Walters presented no evidence of intent. The only evidence regarding intent, or lack thereof, was provided by the affidavit of Charles Dudley, submitted to support the Bank's motion for summary judgment. In that affidavit Mr. Dudley thoroughly and concisely explained how the overcharges and undercharges occurred. He stated that at all relevant times the interest rate ceiling applicable to the thousands of notes held by the Bank was set on computer by manual process. Mr. Dudley stated that during the time the Ten Tex notes were in effect, the prime rate and Federal discount rate changed on a weekly basis. As such, the interest rate and usury ceiling rate under 12 U.S.C. § 85, which is pegged to the discount rate were also changing weekly. When the usury ceiling thus changed, the account officer had to report the new ceiling to the Bank's Loan and Discount Division, where a clerk programmed into the computer the new usury ceiling for the particular note. Mr. Dudley averred that approximately 98 such changes occurred during the relevant time period and that only five errors occurred on the Ten Tex notes. Of these five, three were favorable to Ten Tex and resulted in a net undercharge to Ten Tex. Dudley attributed the errors solely to negligence and inadvertence.

In response Walters presented no evidence tending to show that the Bank acted other than negligently or by mistake. As such, there was a complete failure of proof concerning intent, a required element of Walters' usury case. Summary judgment for the Bank was therefore proper. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 327, 106 S.Ct. 2548, 2553, 2555, 91 L.Ed.2d 265 (1986).

We also find unpersuasive Walters' argument that there was evidence of usury due to the Bank's failure to modify its claims against Ten Tex in the bankruptcy proceeding to take into account the overcharges of which it was by then aware. Walters was granted leave to amend his complaint in the derivative action in order to allege that two of the Bank's claims in bankruptcy court were fraudulent because they were based on usurious interest rates, and because the Bank had received payments from the bankruptcy court after receiving knowledge of the usurious nature of the interest. However Walters voluntarily dismissed this new count on the first day of trial; he is therefore estopped from raising it on appeal.

The Directed Verdict

[4] Walters argues that the district court also erred in directing a verdict for the Bank on the RICO and common law fraud claims, as well as on the breach of contract claims. Central to these claims is the theory that the Bank perpetrated a fraud and breached the loan agreement by charging Walters and Ten Tex an announced published prime rate that was higher than an unannounced lower rate charged to certain other short-term borrowers.

Walters argues that "prime rate" as used in the loan agreements and as generally understood means the best, i.e., lowest, rate given by a bank to its customers.

In order to state a valid RICO claim, a plaintiff must prove that the defendant committed an illegal predicate act. *See* 18 U.S.C. § 1962. Walters relied on the federal mail fraud statute, 18 U.S.C. § 1341, in both the individual and derivative actions. As stated by this court in *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir.1984):

> [t]he crime of mail fraud has two elements: a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954); *United States v. Talbott*, 590 F.2d 192, 195 (6th Cir.1978); *United States v. Schilling*, 561 F.2d 659, 661 (6th Cir.1977). This court has held that the scheme to defraud must involve:
>
> > [*I*]*ntentional* fraud, consisting in deception *intentionally* practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. [*A scheme to defraud*] *requires intent to deceive or defraud.* [Emphasis supplied.]
>
> *Epstein v. United States*, 174 F.2d 754, 765 (6th Cir. 1949). *See also Schilling*, 561 F.2d at 662. This court has also held that the scheme to defraud must involve "misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979).

Id. at 1215-16. There was no evidence that the Bank published a false rate. Although there were admittedly lower interest rates charged to some other short-term borrowers, the Bank presented evidence that certain categories of loans are routinely excluded in the industry in determining a bank's prime rate. Walters' own expert, Mr. Auerbach, agreed on cross-examination that numerous categories of loans were properly excluded by the Bank. He also responded to the Bank's questioning as follows:

> Q: Let me ask you this question, Mr. Auerbach. If in determining the lowest rate in the bank, which you call the actual prime rate, the bank, this hypothetical bank, takes a look at all of its loans that fit the category of the prime and it excludes from that group all of the loans that are in other categories for whatever reason and it determines on making that calculation that the lowest rate that it charges in the prime rate category that remains after eliminating the exclusions is in fact its announced prime, then it has done nothing in your eyes that's wrong, right?
>
> A: That's correct.
>
> Q: Nobody's been defrauded; nobody has been misrepresented and nobody has been deceived?
>
> A: That's right.

The Bank further presented the testimony of one of its officers that the Bank had conducted a search of all its 90-day loans of $100,000.00 or more to corporate borrowers for commercial purposes, and that, according to its findings, the Bank made no loans below its announced prime rate in categories that Walters and Auerbach be-

lieved to be proper in determining the "true" prime rate. Moreover, the Bank also established that of the fourteen loans highlighted by Walters as evidence that the Bank sometimes charged less than the announced prime rate, nearly one-half were required by Tennessee law at that time to have a 10% interest rate ceiling as they were single payment loans of $1,000.00 or less, *see* Tenn.Code Ann. § 47-14-104(a)(1), and/or they fell into the categories that were inappropriate for determining the "prime rate." Finally, there was no evidence that the Bank ever represented that the prime rate would be the lowest rate; rather, Walters, an experienced businessman and member of the board of another national bank, who negotiated his own loan and the Ten Tex loans, proceeded on the basis of his own assumption of what "prime rate" meant.

Given this, the district court properly directed a verdict on the fraud claims. Giving Walters and Ten Tex the benefit of every fair and reasonable inference, there simply was an absence of proof of an intent to defraud, deception, or misrepresentations or omissions reasonably calculated to deceive Walters as required for mail fraud. See *Bender, supra,* 749 F.2d at 1216. As stated by this Court regarding a RICO-mail fraud case decided subsequent to the district court's disposition of this case:

> The fact that the parties take different positions under the contract as to the appropriate prime rate, or the fact that the defendant charged too high a "prime rate" and thereby concealed or refused to disclose what the plaintiff considers the true prime rate called for under the contract, does not give rise to a valid claim for fraud.

Blount Financial Services, Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir.1987). Similarly, the common law fraud claims also premised on the prime rate fraud theory were properly disposed of by way of the directed verdict. *See Gold v. Nat'l Savings Bank of the City of Albany*, 641 F.2d 430, 435 (6th Cir.), *cert. denied*, 454 U.S. 826, 102 S.Ct. 116, 70 L.Ed.2d 100 (1981) (applying Tennessee law).[3]

In the derivative action Walters also claimed that the Bank committed fraud in three other instances: 1) by extending the duration of the side note so that it could collect higher interest than that provided by the industrial bond issue; 2) by withholding bond issue funds on which Ten Tex had paid interest and thereby contributing to its cash shortage, which led to bankruptcy; and 3) by collecting interest upon interest and assessing penalty charges for late payments. Having carefully reviewed these allegations and the record, we conclude that the district court properly rendered a directed verdict for the Bank with regard to these claims.

As the Tennessee Supreme Court has noted in *Jones v. Seal*, 56 Tenn.App. 593, 409 S.W.2d 382 (1966),

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3. In connection with the prime rate fraud portion of the trial, the district court excluded evidence of a 1978 criminal conviction of the Bank which apparently resulted from improper campaign contributions. The district court reasoned that the risk of prejudice substantially outweighed any probative value the conviction had for attacking a small portion of a bank officer's testimony that the Bank would not hire dishonest persons. *See* Fed.R.Evid. 403. The district court's determination can only be reversed for an abuse of discretion. *United States v. Feldman*, 136 F.2d 394, 399 (2d Cir.1943), *aff'd*, 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed.. 1408 (1944). Based upon our review of the record, we are not prepared to say that the district court abused its discretion in excluding this "other crimes" evidence, which may be admissible under the terms of Fed.R.Evid. 404(b).

> "the facts and circumstances proved [at trial] must clearly establish the inference of fraud." 409 S.W.2d at 385. *See also Anderson v. Nichols,* 39 Tenn.App. 503, 286 S.W.2d 96 (1955). A jury cannot render a verdict on the basis of speculation, surmise or conjecture. *See Dayton Veneer & Lumber Mills v. Cincinnati N.O. & T.P. Railway Co.,* 132 F.2d 222 (6th Cir.1942); *Cecil Corley Motor Co., Inc. v. General Motors Corp.,* 380 F.Supp. 819 (M.D.Tenn.1974), and *Groves v. Witherspoon,* 379 F.Supp. 52 (E.D. Tenn.1974).

Gold, 641 F.2d at 435. The evidence presented on these three allegations of fraud would at most have allowed a jury to reach a verdict based on sheer speculation or conjecture.

Walters also alleged that the Bank breached its contract by charging interest on the basis of its announced prime rate rather than its alleged lowest "unannounced" prime rate. The facts and evidence recounted above which permitted the district court to enter a directed verdict on the prime rate fraud theory also supported the directed verdict on the related breach of contract claim. Walters alleged three other state law breach of contract theories, which we believe were also properly the subject of a directed verdict for the Bank.

[5] Walters argued that the $475,000 note was too indefinite to be enforceable because it allowed the Bank to charge interest based on a prime rate that it set unilaterally. As a general principle, the law does not favor declaring contracts void for indefiniteness. Williston, *Law of Contracts,* 3 ed., Vol. 1 § 37. Although we could find no Tennessee cases directly addressing the enforce-

ability of monetary obligations bearing a variable form of interest rate, the overwhelming, if not unanimous, weight of authority upholds the validity of such variable rate contracts, provided the lender's power to vary the interest rate is tied to some objective or marketplace factor. As stressed by the Connecticut Supreme Court in *Constitution Bank & Trust Co. v. Robinson,* 179 Conn. 232, 425 A.2d 1268 (1979),

> The essential characteristic that distinguishes enforceable from unenforceable variable interest rates is the extent of discretion retained by the lender. If the lender may arbitrarily adjust the interest rate without any standard whatsoever, with regard to this borrower alone, then the note is too indefinite as to interest. If however the power to vary the interest rate is limited by the marketplace and requires periodic redetermination, in good faith and in the ordinary course of business, of the price to be charged to all of the bank's customers similarly situated, then the note is not too indefinite.

Id. at 237, 425 A.2d at 1270-71. *Accord Bank of Maine, N.A. v. Weisberger,* 477 A.2d 741, 744 (Me.1984); *Powell v. Central California Federal Savings & Loan Ass'n,* 59 Cal.App.3d 540, 549, 130 Cal.Rptr. 635, 640-41 (1976); *Restatement 2d of Contracts,* § 34(1) and comment a. Certainly, the evidence submitted by the Bank and testimony of the bank officer unequivocally show that the interest rate was set according to the fluctuation in the prime rate, was redetermined as the rate changed, and did apply to all similarly situated bank customers, i.e. those customers with loans in the same category. The Bank did not have unfettered discretion in setting the

interest rate on Mr. Walters' loan. As such, we believe that Tennessee courts would conclude that the terms of the note were sufficiently definite to be enforced.

[6] Walters also advanced the argument that even if the collection of interest in certain instances was not usurious, it nonetheless breached the contract because the maximum interest rate under his promissory note was limited by usury laws in force as of May 3, 1979, the date he obtained the $475,000 loan, and not as of the date the interest was collected. The plain language of the note is contrary to Walters' interpretation:

> The rate of interest on the unpaid principal balances of the indebtedness hereby evidenced shall be adjusted as of each day that the prime rate is changed; provided, always, however, that notwithstanding any changes in said prime rate, the *rate of interest hereon prior to maturity shall never be more than the maximum lawful contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge from time to time.* . . . It is the intention of the maker and the bank to contract in strict compliance with the usury laws as set forth at 12 U.S.C. § 85, and the law of the State of Tennessee incorporated therein by reference; and, accordingly, in no event and upon no contingency shall the bank ever be entitled to receive, collect, or apply as interest any interests, fees, other payment equivalent to interest, in excess of the maximum contract rate which may, *from time to time,* be lawfully charged to the maker hereof under the applicable law by a national bank having its principal place of business in the State of Tennessee. (emphasis added).

Clearly, the Bank was not limited by the maximum rate in effect on the day of signing, but could charge interest limited by the rate ceiling and usury laws in effect as they changed "from time to time." Our conclusion on this issue also necessarily disposes of Walters' remaining, related claim that by charging interest in excess of that allowed under usury laws in effect on May 3, 1979, the Bank committed an anticipatory breach of the contract which excused Walters from fulfilling his obligations under the note.[4]

The Judgment NOV

[7] Although all of the usury claims in the derivative action were dismissed in the summary judgment order, certain of Walters' usury claims on his personal loan did go to the jury. The district court had ruled that the two year statute of limitations barred Walters' usury claims prior to May 22, 1980, a ruling which Walters has not challenged. The district court also ruled during the course of the trial that as a matter of law any usury claims after October 8, 1980, on the personal loan necessarily failed based upon the court's construction of certain state and federal interest rate statutes.[5] Conse-

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4. Assuming, *arguendo*, that the Bank did so violate the contract, Walters still would have no claim for anticipatory breach, because the Bank had substantially performed under the contract. *See Constitutional Bank & Trust Co.*, 425 A.2d at 1270.

5. Walters superficially challenges the district court's construction of Pub.L. No. 96-221 and Pub.L. No. 96-399 in its appellate brief by simply referencing its trial memorandum. We cannot countenance this attempt to circumvent Fed.R.App.P. 28(g) and its limitation on appellants' briefs to 50 pages. As stated in *Katz v. King*, 627 F.2d 568 (1st Cir.1980): "If counsel

(Continued on following page)

quently, the jury was presented with usury claims on the personal loan based on overcharges totalling $337.06 between May 29, 1980 through June 8, 1980, and from September 8, 1980 through September 25, 1980.

Specifically, the district court submitted the issue to the jury by means of the following special interrogatory:

> Did the defendant First Tennessee Bank knowingly take or receive from or charge to the plaintiff William S. Walters, Jr. interest in excess of the lawful rate on the $475,000.00 note signed May 3, 1979, between the date of its signing and December 2, 1980?

The district court further instructed the jury that:

> The word "knowingly" means intentionally receiving interest in excess of the amount authorized by appropriate laws. Knowingly does not include collecting interest above the lawful amount due to a mistake of fact or by an unintentional error of fact.

The jury responded "yes" to the special interrogatory.

We believe that the district court properly rejected the jury's verdict for Walters and entered judgment NOV.

Footnote continued—

desires our consideration of a particular argument, the argument must appear in the four corners of the brief filed in this court." *Id.* at 575. Insofar as Walters argues that this federal legislation, which preempted state usury ceilings and granted interest rate relief to banks during and after 1980, constitutes an unconstitutional impairment of the contract, we note that no court has ever declared these statutes unconstitutional. Moreover, the contract Walters signed expressly contemplated that the interest rate charged and allowed by law would or could fluctuate from "time to time," which negates his contention that the rate in effect on the date of signing of the contract was the maximum rate that could ever be charged.

The only testimony at trial regarding the Bank's overcharge was that of Mr. Dudley. His testimony at trial with regard to the $475,000.00 loan corroborated and mirrored his affidavit, discussed above in conjunction with the summary judgment for the Bank on the Ten Tex loan usury claims. As in his affidavit, Dudley testified that the two overcharges resulted from inadvertent clerical oversight, i.e. a Bank employee's failure to enter the lower usury ceiling on the computer when the federal discount rate dropped. In addition, similar programming oversights occurring when the discount rate and usury ceilings rose resulted in the Bank's undercharging Walters more than it ever overcharged him. Indeed, the Bank's undercharges preceded any overcharges. In face of this evidence which at most established negligence on the part of the Bank, Walters presented no contradictory testimony or evidence. His argument on appeal centers around a theory that the Bank committed usury because it "knowingly" made a choice to use a computer system which permitted such errors to occur. However, this argument only permits one to conclude that the Bank was negligent. As such, the district court correctly entered a judgment NOV. Viewing the case in a light most favorable to Walters, and drawing all reasonable inferences in his favor, there simply was an absence of proof of knowing conduct by the Bank, an essential element of usury under 12 U.S.C. § 86 which Walters had the burden of proving "convincingly," *Wheeler v. Union National Bank of Pittsburgh,* 96 U.S. 268, 270, 24 L.Ed. 833 (1878).

III.

We have thus considered the numerous issues in this appeal, and conclude that the district court's judgment was correct in all respects. In so doing, we carefully and fully reviewed all of the arguments raised by the parties and the voluminous record in this case. Accordingly, the judgment of the district court is hereby AFFIRMED.

(Filed August 15, 1986)

This document entered on docket in compliance with Rule 58 and/or Rule 79(a), F.R.Civ.P., on 8/18/86

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

CIVIL ACTION
NO. 82-2391-M

WILLIAM S. WALTERS, JR.,
Plaintiff,

v.

FIRST TENNESSEE BANK, N.A. MEMPHIS and
DOES 1 Through 99,
Defendants.

and

CIVIL ACTION
NO. 82-2783-M

FISCHER LIME AND CEMENT COMPANY, INC.,
Plaintiff,

v.

WILLIAM S. WALTERS, JR., and FIRST TENNESSEE
BANK, N.A. MEMPHIS,
Defendants.

JUDGMENT

In accord with the Order Directing Entry Of Judgment heretofore filed in the instant case, it is

ADJUDGED that, upon directed verdict, all claims, except that portion of the crossclaim submitted to the jury, made by plaintiff/crossclaimant/counterdefendant, William S. Walters Jr., shall be and the same hereby are dismissed. It is

FURTHER ADJUDGED that that portion of the crossclaim of plaintiff/crossclaimant/counterdefendant, William S. Walters, Jr., submitted to the jury, upon the court's judgment notwithstanding the jury's verdict, shall be and the same hereby is dismissed. It is

FURTHER ADJUDGED that the Counter-Complaint filed by defendant/counterclaimant/cross-defendant, First Tennessee Bank N.A. Memphis, the claims being made thereby having become moot and non-justiciable, should be and the same hereby are dismissed.

ENTERED this 15th day of August 1986.

Approved for entry

/s/ Robert M. McRae, Jr.
US Dist Judge

Clerk United States
District Court for the
Western District of
Tennessee

By: /s/ Donna L. Russell

Approved As to Form:

Parrish & Mulrooney, P.C.
By: /s/ Larry E. Parrish
Larry E. Parrish
Attorneys for Plaintiff/
Counterdefendant, William S.
Walters, Jr.

and

Heiskel, Donelson, Bearman, Adams,
Williams & Kirsch

By: .....
Attorneys for Defendant/Counterclaimant,
First Tennessee Bank N.A. Memphis

(Filed August 15, 1986)

This document entered on docket in compliance with
Rule 58 and/or Rule 79(a), F.R.Civ.P., on 8/18/86

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

CIVIL ACTION
NO. 82-2391-M

WILLIAM S. WALTERS, JR.,
Plaintiff,

v.

FIRST TENNESSEE BANK, N.A. MEMPHIS and
DOES 1 Through 99,
Defendants.

and

CIVIL ACTION
NO. 82-2783-M

FISCHER LIME AND CEMENT COMPANY, INC.,
Plaintiff,

v.

WILLIAM S. WALTERS, JR., and FIRST TENNESSEE
BANK, N.A. MEMPHIS,
Defendants.

ORDER DIRECTING ENTRY OF JUDGMENT

At the close of all the proof at trial, defendant/ counterclaimant/ cross-defendant, First Tennessee Bank N.A. Memphis (hereinafter "First Tennessee"), made a motion for directed verdict with respect to all claims, including cross-claims made in No. 82-2783-M by plaintiff/ crossclaimant/counterdefendant, William S. Walters, Jr. (hereinafter "Walters") and the First Tennessee counterclaim against counterdefendant, William Walters. Upon consideration of the aforesaid motion for directed verdict at the close of proof, the court directed a verdict against Walters on all claims, of plaintiff, except part of the claim for usury, which was submitted, by interrogatory, for jury verdict, and against Walters on the counterclaim of First Tennessee. As to the portion of the usury claim of Walters submitted for jury verdict, the jury returned a verdict in favor of Walters. Upon argument of counsel and the entire record in the cause, including the jury's verdict in the form of an answer to an interrogatory, and, for the reasons set forth in the court's ore tenus order in open court and the court's "Ruling on Post-Trial Arguments and Motions" entered on June 5, 1986, it is

ORDERED, ADJUDGED AND DECREED that judgment be entered by the Clerk in favor of First Tennessee, based on the ore tenus order directing a verdict at the close of all of the proof at trial. It is

FURTHER ORDERED, ADJUDGED AND DECREED that judgment in favor of First Tennessee and against Walters, on the usury claim of Walters submitted to the jury, be entered by the Clerk notwithstanding the jury's verdict. It is

FURTHER ORDERED, ADJUDGED AND DECREED, with regard to the Counter-Complaint filed by First Ten-

nessee against Walters because $697,809.21, representing an amount equal to what First Tennessee claimed as principal and interest through January 13, 1986, has heretofore been delivered by Walters and accepted by First Tennessee, in full satisfaction of the claim of debt forming the basis for the counterclaim, pursuant to an agreement between First Tennessee and Walters dated January 10, 1986, the purpose of which was to allay any claim by First Tennessee that further interest was accruing and to alleviate any need for a supercedeas bond, the claims made by First Tennessee in the Counter-Complaint are now moot and non-justiciable; therefore, the Counter-Complaint should be dismissed, and the Clerk shall enter a judgment dismissing same.

ENTERED: This 15th day of August 1986.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr.,
Judge

Approved As to Form:

Parrish & Mulrooney, P.C.
By: /s/ Larry E. Parrish
Larry E. Parrish
Attorneys for Plaintiff/
Counterdefendant, William S.
Walters, Jr.

and

Heiskel, Donelson, Bearman, Adams,
Williams & Kirsch

By: .....
Attorneys for Defendant/Counterclaimant,
First Tennessee Bank N.A. Memphis

(Filed June 4, 1986)

This document entered on docket in compliance with Rule 58 and/or Rule 79(a), F.R.Civ.P., on 6-5-86

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

No. 82-2391-M

WILLIAM S. WALTERS, JR.,
Plaintiff,

vs.

FIRST TENNESSEE BANK, N.A. MEMPHIS, and
DOES 1 through 99,
Defendants.

No. 82-2783-M

FISCHER LIME & CEMENT CO., INC.,
Plaintiff,

vs.

WILLIAM S. WALTERS, JR. and FIRST TENNESSEE
BANK N.A. MEMPHIS,
Defendants.

No. 82-2869-M

WILLIAM S. WALTERS, JR., Individually and for himself and the other Shareholders of TEN TEX MARINE, INC., Similarly Situated,
Plaintiffs,

vs.

FIRST TENNESSEE BANK, N.A. MEMPHIS, DOES 1 through 99, and TEN TEX MARINE, INC.,
Defendants.

RULING ON POST-TRIAL ARGUMENTS AND MOTIONS

In the matter of these cases, the attorneys for Walters and the First Tennessee Bank (Bank) have raised contradictory positions after a jury trial wherein the Court presented to the jury an interrogatory to determine whether the Bank had *knowingly* taken or received from Walters interest in excess of the lawful rate on a $475,000 note signed May 3, 1979. The jury answered the question "yes," and the Court directed counsel to present proposed judgments in the light thereof. This prompted Plaintiff's Memorandum of Law in Support of Plaintiff's Proposed Judgment and defendant's Memorandum of First Tennessee Bank National Association in Support of Its Proposed Judgment. Counsel for the plaintiff proposed a judgment which granted the plaintiff relief (1) in the amount of $975,966.86 because there had been a usurious interest charge and (2) a forfeiture of all interest accrued and unaccrued on the $475,000 note. On the defendant Bank's counterclaim the plaintiff proposed

that the judgment provide that the Bank recover the principal balance of $474,784 on the $475,000.

Background Facts

William S. Walters, the plaintiff, is a young man whose maternal forebears founded and developed a very successful business known as Fischer Lime & Cement Company in Memphis, Tennessee. Probably through the theory of primogenitor, the plaintiff became the CEO of Fischer at a relatively young age. He and his mother, an active participant and large stockholder in the business, differed on how the business should be run. He sold his stock to the company evidenced by a promissory note payable over a period of years. He then undertook to conquer the world and make his fortune through a series of improvident ventures which have managed to consume the money he inherited from the family business. The immediate improvident venture which prompted his borrowing from the Bank was an ill-advised, poorly timed marine enterprise with an incompatible partner or associate. In the process, he put up the balance of his nest egg note from Fischer for his inherited interest in the family business. Therefore, when his marine adventure failed, the Bank began collecting its money from the payments on the Fischer note.

The proof reflects that plaintiff had developed some acumen in banking by virtue of having been (by inheritance) a member of the board of directors of a Memphis, Tennessee bank which competed with the Bank. Even so, the plaintiff signed a note with the Bank whereby the interest fluctuated with the prime interest rate. Consequently, the plaintiff who was used to the finer things in life found himself in a meager to unsuccessful means

of acquiring income, and the monthly payment on the Fischer note was not even paying the interest on his $475,000 note then in default.

This Lawsuit and the Post-Trial Issues

In case number 82-2391, Walters sued the 1st Tennessee Bank and certain John Doe individuals under the relatively new Racketeer Influenced and Corrupt Organization Act (RICO) and the usury laws applicable to national banks, 12 U.S.C. §§ 85 and 86. It was the theory of the plaintiff that officials of the bank had committed violations of RICO because the loan was pegged to the bank's prime interest rate which the plaintiff thought was the very best interest rate. Plaintiff further contended that communications concerning the note were violations of the criminal law pertaining to mail or wire fraud. At the end of the plaintiff's proof, the Court ruled that there was no proof whatsoever to support RICO violations and dismissed those charges from the complaint. After the RICO claims were dismissed, counsel for the plaintiff concentrated on the usury claims and also asserted a bizarre breach of contract claim.

Case number 82-2783 was an interpleader action whereby Fischer Lime and Cement Co. tendered into the Court as they became due the payments on its note payable to the plaintiff who in turn had pledged it to the Bank. An agreement was reached to deposit these proceeds in an interest-bearing deposit arrangement.

Case number 82-2869 is styled a stockholders derivative action filed by Walters as a stockholder of Ten Tex Marine Inc., the ill-fated marine venture which went into bankruptcy. Walters claims the Bank is liable to

the bankrupt corporation under numerous complex claims, including RICO, usury and bankruptcy fraud. Walters, whose joint venturer refused to join the suit, seeks recovery because he was a stockholder and had guaranteed certain Ten Tex obligations. This case was dismissed on all grounds prior to or during the trial.

Usury Claims

As previously indicated the Court submitted an interrogatory to the jury on the usury issue. That interrogatory read as follows:

> Did the defendant First Tennessee Bank knowingly take or receive from or charge to the plaintiff William S. Walters, Jr. interest in excess of the lawful rate on the $475,000.00 note signed May 3, 1979, between the date of its signing and December 2, 1980?
>
> The jury answered the interrogatory by responding "Yes."

Also, as previously indicated, because there were numerous questions of law which might affect the judgment, the Court directed counsel for the parties to prepare proposed judgments in view of the jury's response. Counsel for the plaintiff seeks double interest in the amount paid and forfeiture of all accrued and unaccrued interest on the $475,000 note which he asserts calls for a judgment of $975,966.85. On the Bank's counterclaim, the plaintiff's proposed judgment provides for payment by Walters to the Bank of the unpaid principal on the note in the amount of $474,784 and no more. The plaintiff's proposed judgment also provides that the breach of contract claim asserted in plaintiff's original complaint

based upon an overcharge of interest is moot and therefore withdrawn.

On the other hand, the Bank proposes a judgment on plaintiff's complaint which grants the motion for a directed verdict made by the Bank at the end of all of the proof. The proposed judgment provides that the Bank have a judgment on the counterclaim for the unpaid principal and interest on the note in the total amount due.

A hearing was held upon the proposed judgments and the memoranda relied upon in support of the respective contentions.

The Bank primarily attacks the jury's verdict that the Bank knowingly charged interest at a rate in excess of the legal rate, the amount allowed by the federal discount rate plus five percentage points. The Bank admits that its personnel did make excessive charges during two periods while it was charging and collecting interest on the Walters' $475,000 note. Those periods were May 29, 1980 through June 8, 1980, and September 8, 1980 through September 25, 1980.

The Bank asserts that there is no evidence to establish that the Bank *knowingly* made the admittedly excessive charges. Charles B. Dudley, III, the Bank officer who handled the plaintiff's account, including the loan involved in this case, was questioned about the cause of the overcharge. While the actual steps taken to make the excessive charges and record them were not done by him nor under his supervision, he opined that the overcharges were an "inadvertent" failure to lower the Bank's usury ceiling on the computer when the federal discount rate dropped. He testified that the Bank was undergoing a conversion in its computer systems which made it im-

possible to add enhancements to the existing system; therefore it was necessary to input changes in the usury ceiling with regard to each variable rate note. As indicated above, the above procedures were not within the department in which Mr. Dudley had expertise, specific knowledge or authority.

This Court instructed the jury as follows:

> The word knowingly means intentionally receiving interest in excess of the amount authorized by appropriate laws. Knowingly does not include collecting interest above the lawful amount due to a mistake of fact or by unintentional error of fact.

It must be remembered that this was one of many issues raised by the proof of this case which was presented primarily as a RICO case. Therefore the jury was offered in-depth testimony about the relationship between the Bank and Walters as follows:

> The nature of the note gave the Bank full control over the rate of interest to be charged and the record keeping on how the plaintiff's payments were to be credited. In the first place, the Bank absolutely determined its prime rate to which the note interest was pegged. Additionally, the federal discount rate was a matter which the bank unilaterally applied.
>
> The Bank also prepared the note and inserted in its terms a provision that if the Bank ever received any excessive interest it would not be considered usurious interest, and it would be applied to principal. This was not done through the time of the trial.
>
> The note was also secured by all of plaintiff's stock in Ten Tex Marine, and a note of Ten Tex

Marine in the amount of $350,000 payable to plaintiff as well as Fischer Lime and Cement Company's stock sale agreement which originally bound Fischer to pay plaintiff $1,378,500.

Furthermore the Bank was heavily involved with Ten Tex Marine including serving as a Trustee for the disbursement of funds which Ten Tex borrowed via an Industrial Development Bond Issue in the amount of $1,425,000.

Additionally, there is proof to show that the plaintiff made more than one demand for a record of the charges and payment of his note account and that the same was considerably delayed in being furnished.

All of the above undoubtedly creates sympathy for the plaintiff as a defeated and defenseless individual against a Bank which handled the transaction literally so that the Bank would not lose money or would lose as little as possible regardless of the overall consequences to the plaintiff. Even though the plaintiff was experienced in business and banking practices, he was a victim of the Bank's policies of protecting itself in every conceivable way. This Court has spent many hours in consideration and contemplation of the post-trial positions of the parties and has concluded that the most difficult and the primary issue is whether there was evidence sufficient to submit the questions of whether the Bank acted *knowingly* in its overcharges of interest as the term "knowingly" is used in 12 U.S.C. § 86. After much difficulty, the Court has determined that there was insufficient evidence to support the jury's response to the interrogatory and that the Court should have directed a verdict for the defendant.

This case was prepared and presented as a RICO case. In the opinion of this Court, counsel for the plaintiff presented a RICO theory that was bizarre and woefully inadequate. In addition, counsel asserted a breach of contract claim based upon a theory that the Bank first breached the contract evidenced by the promissory note so the plaintiff wins. Similarly, there was the plaintiff's stockholders derivative action which required reconstruction of all of the actions taken between Ten Tex and the Bank prior to and during Ten Tex's bankruptcy. Therefore the usury issues played a very minor role in the trial of the case until the Court dismissed all other claims of the plaintiff. The record will reflect that the Court received memos on usury which were prepared during recesses of the trial. Consequently the Court and the jury did not have the benefit of proof thoroughly developed by discovery on the issues of the Bank's intent in its overcharge.

In submitting the issue to the jury the Court failed to observe its earlier observations and finding in the Ten Tex case, No. 82-2869. In dismissing the usury claim in that case the Court stated:

> It has been consistently held by courts considering the issue of usurious intent that inadvertent errors in bookkeeping or mathematical computations, when not mistakes of law, are insufficient to show intent. *Ford Motor Credit Corp. v. Catalavi,* 238 Ark. 561, 583 S.W.2d 99 (1964); *See* Cases collected at 11 Am.Jur.2d 1498. In the instant case, there is no usurious intent evident on the face of the note which distinguishes it from typical usury cases. *See Mutual Protective Corp. v. Polatnick,* 118 Conn. 1, 169

A. 917 (1934). Thus, this Court holds that the requisite intent required under 12 U.S.C. § 86 was lacking and for that reason there was no violation of the statute. (*Order on Motions for Summary Judgment,* entered September 20, 1984. P. 7)

The plaintiff failed to offer his own proof with regard to the issue of whether the charging of $337.06 in "excess" interest on the $475,000.00 promissory note was *"knowingly done"* as required to subject First Tennessee to the forfeiture and penalty provisions of 12 U.S.C. § 86. The focus of the inquiry by the Court in addressing this question must be, as the Court has ruled, whether there was evidence that the overcharges were made "knowingly" since First Tennessee admitted that the interest charges occurred.

The plaintiff must prove that the taking of excess interest was "knowingly done." The plaintiff has offered no direct or sufficient circumstantial proof on the issue of "knowingly done." The *only* specific testimony at the trial concerning this issue came from the Bank's witness, Charles B. Dudley, III. As heretofore indicated, he speculated that First Tennessee *inadvertently* and *mistakenly* charged Mr. Walters in excess of the amount allowed by the federal discount rate plus five percentage points on two occasions (May 29, 1980 through June 8, 1980, and September 8, 1980 through September 25, 1980). Mr. Dudley testified that he thought that in each of those two instances, the overcharge resulted from an inadvertent failure to lower the Bank's usury ceiling on the computer when the federal discount rate (and therefore the usury ceiling) dropped even though he had nothing to do with the overcharge. Mr. Dudley testified

that the Bank was undergoing a conversion in its computer systems which he understood and believed made it impossible to add enhancements electronically to the existing system and therefore it was necessary at the relevant times manually to input the changes in the usury ceiling with regard to each variable rate note. He speculated that on these two occasions, there was simply a failure to reduce the interest ceiling on the computer with regard to Mr. Walters' note, just as there had been a failure to increase interest charges when a greater amount of undercharges were made.

Mr. Dudley testified that the usury ceiling or the prime rate changed over ninety times during the period covered by this lending transaction. He also testified that on three occasions the Bank *undercharged* Mr. Walters due to the same type of "inadvertent" errors in setting the rate on the computer that caused the "overcharges." Mr. Dudley's testimony indicated that these undercharges preceded and exceeded the amount of the overcharges, so that at all times First Tennessee, on a cumulative basis, charged Walters *less* than allowed by law. While this Court does not conclude that a usurious lender may avoid usurious charges knowingly made by netting them out against undercharges, the fact that the same system which created the overcharges created undercharges may be considered upon the question of whether the overcharges were knowingly made.

Although counsel for Mr. Walters attempted to impeach Mr. Dudley's testimony by suggesting in his questions that the overcharges were or may have been intentional, he produced no witness to testify on this point and presented no other evidence which would tend to

prove any such intent. Mr. Dudley's trial testimony, his deposition testimony, and his affidavit in this case all reflect that the "overcharges" were unintentional and inadvertent.

There is substantial case law which provides that "the burden to plead and prove usury which does not appear on the face of an instrument rests on the party seeking to avoid the instrument." *Maestro Music, Inc. v. Rudolph Wurlitzer Co.*, 354 P.2d 266, 271 (Ariz. 1960); and *Murphy Finance Co. v. Fredricks*, 127 N.W.2d 924 (Neb. 1964). This includes the element of intent. *Sumner v. Investment Mortgage Company of Florida*, 332 So.2d 103 (Fla. App. 1976).

Usury cannot be established by mere inference or conjecture. *See* cases collected at 51 ALR2d 1087, including the United States Supreme Court case of *Ewing v. Howard*, 19 L.Ed. 293, 7 Wall 499 (1869) wherein the court stated:

> Usury is a defense that must be strictly proved, and the court will not presume a state of facts to sustain that defense where the instrument is consistent with correct dealing. 19 L.Ed. at 296.

In *First National Bank in Mena v. Nowland*, 509 F.2d 872, 876 (8th Cir. 1975), the United States Court of Appeals for the Eighth Circuit, on appeal from the Arkansas District Court stated, that the primary principle used in the construction of 12 U.S.C. § 85 "is that the Federal act adopts the entire case law of the state interpreting the state's limitations on usury . . ." Tennessee law would not support a charge of usury created by an inadvertent error by the Bank. See, for example, *White v. Kaminsky*, 196 Tenn. 180, 264 S.W.2d 813 (1954), in which the Supreme

Court of Tennessee cites with approval the following language:

> It is generally conceded that the exaction of more than legal interest through an honest mistake of fact, as, for example, because of a mistake in computation, or a scrivener's mistake in drawing an instrument, is not usurious.

Although counsel for the plaintiff has argued that defendant's deck of cards falls in because the Bank used the discount rate of the Atlanta Federal Reserve District as opposed to the St. Louis District, which was a mistake of law, it is clear from the testimony at trial that at the very most: mistakes of fact were involved. No intent to knowingly collect usurious interest can be found from the proof in the record, and a judgment for defendant must be entered.

By way of alternate defenses the Bank asserts that the overcharges were not usurious because the undercharges preceded and exceeded the overcharges. Although the Court has found for the defendant on the issue of knowingly, the Court does note that it does not agree with the Bank's net theory. If a lending institution knowingly charges usurious interest, it may not justify its unlawful conduct by reliance on prior or subsequent undercharges to cover up. *Citizens National Bank v. Donnel,* 195 U.S. 369 (1904).

Similarly there is no *de minimis non curat lex* application when usury is shown. *Haas v. Pittsburgh National Bank,* 526 F.2d 1083 (3rd Cir. 1975).

Similarly, this Court would and does reject the defense of the Bank based upon the "savings clause" in the

note. This clause reduced to its simplest meaning says the parties do not intend to violate the usury laws but if they do, they did not mean to and the excess interest will be credited to the principal. If the Bank had knowingly violated the usury laws, that clause would not save it, especially since they had not at trial time credited the excess interest charges to principal.

If the Court were finding for the plaintiff, the Court agrees that the measure of damages would be forfeiture of all accrued and unaccrued interest and twice the amount of all interest paid.

As the Supreme Court stated in *First National Bank of Lake Benton, Minnesota v. Watt,* 184 U.S. 475, 476 (1902):

> The first sentence of the section provides that 'the taking, receiving, reserving, or charging a rate of interest greater than is allowed, . . . [omission by Supreme Court] when knowingly done, shall be deemed a *forfeiture of the entire interest* which *the note,* bill, or other evidence of debt *carries with it,* or which has been agreed to be paid thereon.' This, without the slightest ambiguity, provides for the forfeiture, not of the amount by which the usurious has exceed the lawful rate, but the entire interest. When the statute then proceeds, in the very next sentence, to say, 'in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back . . . [omissions by Supreme Court] twice the amount of the interest thus paid,' it *cannot* in reason *be held that* the words, *the interest thus paid, refer to any other sum than the entire interest* as provided in the previous sentence. (emphasis added) 184 U.S. at 476.

Summary

Based upon the foregoing, a final judgment in favor of the defendant and counter-claim plaintiff should be prepared by counsel for the First Tennessee Bank, N.A., Memphis, in cause number 82-2391. Said judgment pertaining to the counterclaim shall reflect the transactions agreed upon and made since the trial.

Counsel are also directed to see that appropriate judgments are entered in the other two cases, 82-2783 and 82-2869, to the end that all issues may be appealed simultaneously.

IT IS SO ORDERED.

ENTER: This 4th day of June, 1986.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr.
United States District Judge

CIVIL DOCKET CONTINUATION SHEET
DOCKET NO. 82-2391

WALTERS
Plaintiff

FIRST TN BANK
Defendant

Date	NR.	Proceedings
		MINUTES:
9/85		Larry Parrish appeared for the plaintiff and Leo Bearman, Jr. appeared for the defendant. 9:45 A.M. 8 jurors present. Court discussed statutes as to maximum interest rates, RICO, etc. Court reversed former position and says that the interpretation of the bank is correct from 12/2/80 until 7/1/81. This is an adverse ruling to the plaintiff. The remaining issue-overcharges made prior to 12/2. usury. 1:50 P.M. Closing arguments of attorneys and rebuttal. Court charged the jury at 3:20 P.M. after which the jury retired to deliberate. The jury requested certain exhibits. The Court conferred with the attorneys and he said regardless of how the jury rules, Court would to direct counsel to file proposed judgment on what he did and include application for attorneys' fees for collecting and set on a Friday afternoon the proposed judgment and invite Fisher's Attorney and should go first. 4:25 P.M. Court gave jury

Date	NR.	Proceedings
		Ex. #5 and #14 through 12/2 and then retired to resume deliberation. 5:05 P.M. Court called jury in as to whether to stay or come back tomorrow and they retired to decide. The jury elected to resume on 9/10/85 and court therefore adjourned until 9:00 A.M.
10/85		MINUTES: Larry Parrish appeared for the plaintiff and Leo Bearman, Jr. appeared for the defendant. Jury resumed their deliberation at 8:52 A.M. with exhibits #5 & 14 and verdict form. 10:45 A.M. Jury inquired of court to read definiation of the work knowingly- Court re-read the applicable part of his charge, and the jury resumed deliberation. 2:12 P.M. Jury returned verdict that deft. charged the pltf. interest in excess of lawful rate. Jury polled on Court's own motion and asked each one individually that their verdict was based soley on evidence applicable to the issue. Court did not want the jurors interviewed unless there is an application from the attorneys. Larry Parrish is to prepare judgment in the individual cases (including the Ten-Tex Corp.) which would award double the amount of dollars, etc. Deft. to prepare judgment on counterclaim. There are to be done within 10 days. Court will hear oral arguments on judgment FRIDAY, SEPTEMBER 27, 1985, at 2:00 P.M.

Date	NR.	Proceedings
10/85	119	Plaintiff William S. Walters, Jr., special requests for jury instructions-marked by Court "Refused as submitted, intimely, after argument and charge"
10/85	120	VERDICT- Jury answered "Yes" to question whether the 1st Tenn. Bank knowingly charged the plaintiff interest in excess of the lawful rate on the $475,000.00 note signed May 3, 1979, between that date and December 2, 1980
9-85		HEARING SET for Fri., 9-27-85 at 2:00 p.m. on Oral Arguments on Judgments
9/85	121	REQUEST FOR JURY INSTRUCTION #1-submitted by plaintiff - marked by Court "Refused" 9/9/85 (filed in C-82-2391-M)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

NO. 82-2391-H

WILLIAM S. WALTERS, JR.,
Plaintiff,

VS.

FIRST TENNESSEE BANK, N.A. MEMPHIS
and DOES 1 THROUGH 5,
Defendants,

AND

NO. 82-2783-H

FISHER LIME AND CEMENT CO., INC.,
Plaintiff,

VS.

WILLIAM S. WALTERS, JR. and FIRST
TENNESSEE BANK, N.A.
MEMPHIS,
Defendants,

AND

NO. 82-2869-M

WILLIAM S. WALTERS, JR. AND OTHER SHAREHOLDERS OF TEN TEX MARINE, INC., SIMILARLY SITUATED,
Plaintiffs,

VS.

FIRST TENNESSEE BANK, N.A. MEMPHIS and DOES 1 THROUGH 99,
Defendants.

* * * [1174] involves some of the same questions or some of the same proof—is pertinent to the RICO matters and the fraud question. But, I want to hear the defendant's proof on that even though we've heard the position of the defendant during the plaintiff's proof because they used three officials or the testimony of three officials.

Now, on the usury I'm going to grant the motion, not for a directed verdict, but grant the motion on a legal question about the statutory construction so that any usury charges by surcharge or otherwise are subject to—to be submitted to the jury for the Federal cause usury through July 1, 1981.

I deny any motion for a directed verdict on the Fifth Amendment grounds asserted by the plaintiff and, therefore, any usury based upon the National Banking Act after that date is not allowed. The bank's position is well taken as far as relying on that surcharge or other matters based upon the interpretation of the National Banking Act.

What I'm holding is that I'm agreeing with the plaintiff's position through July 1, 1981 [1175] and disagreeing with the argument on the constitutional question. I'm not making this as a final ruling but I need some more authority for the fact that a mistake of law is not a defense for usury. If you've got a question of willfulness or intent to establish usury, I think a mistake of law is at least a question that a defense that can be asserted in so far as whether or not something was willful or intentional.

Now, on the general motion and the more specific ones on RICO and others I overrule the defendant's motions. Well, I'll reserve my ruling on the alleged ambiguity, which to me it does seem ambiguous on that nine percent versus a hundred thirty percent of prime. On the RICO I'm prepared to hold, I don't know that I need to rule this, that the enterprise, if there is one in this case, is the First Tennessee Bank and that there must be proof of some person other than the legal entity of the bank that is proven guilty of the acts of mail fraud.

I invite the attorney for the defendant to renew the motions except to the extent I ruled on them which isn't very much, I agree, because I think a trial judge who is in this position with this kind * * *

* * *

* * * [1728] point. I'll go on while we're at that.

The third point, my inclination is that the position of the plaintiff is well taken, that is, that after March 23 First Tennessee continued to administer the loan precisely and exactly as it had prior to March 23 with respect to the charging and collection of interest. It

seems to me once they did that they did not accelerate the loan. The letter says we will ask our attorney to take whatever action is appropriate or something like that, and they certainly in later calculating didn't take that action. Whether that would have benefitted Mr. Walters or not I don't know. I put a note on that. It seems to me that this is the same—it's analogous to the procedure that Mr. Dudley said the bank followed when they found a loan that had below prime interest rate in it by error. Before they corrected it the note was paid off. Therefore, they were bound—they certainly didn't go back and correct that and change it after the note was paid and I think that's analogous.

Now, the thing that I need to address next—I've been working at night. I started working on the charge books and the digest on [1729] fraud. This is my reaction—I'm saying this for the benefit of counsel—the attorneys in this case, I believe for both sides, have recognized that in common law fraud, and I'm saying that means misrepresentation, fraud and inducement, the lawyers have used the terms clear and convincing or cogent, clear and convincing to prove fraud. Fraud in its basic definition, raw fraud, is a false statement knowingly made relied upon by the other to his injury.

I remember the case that I tried—and I think it's of some help on this—of course, these claims are diversity claims. This is Freddy Gold and wife, Goldie Gold versus the National Savings Bank of the City of Albany. I don't know whether anybody in this room is familiar with the case, but I am because we tried it with Mr. Charles Black representing the Golds and the Martin-Tate firm by Mr. Marston and Mr. Piovarcy. This was a construction loan commitment and it had a very un-

usual—it wasn't so unusual, it said that the bank got to send its representative down and examine the property and that if their representative found it wasn't built in accordance with the plans and specifications, then they [1730] didn't have to make the loan. They did that.

I found a case that was decided in 1895 that said that when this sort of discretion is given to one party, then the test is whether or not the representative acted in bad faith. That's the question I put to the jury and the jury answered that the man had acted in bad faith which surprised a number of people including Mr. Black, but in any event, that's what the jury found. I adjusted the verdict, knocked out the punitive damages and adjusted the compensatory damages, denied a motion for verdict—an NOV. The court of appeals reversed and went into a discussion. I don't mean to say the facts of this case or the nature of the fraud were the same although there is a slight analogy because I think at least it's charged that the right to determine what is prime rate is a unilateral matter with the bank and it certainly is as between these parties.

Anyway, this is something that dawned on me and it says, without considering the substantial countervailing evidence supporting the bank's view of the transaction and taking the evidence introducing by Gold in the light most favorable to him there is still inadequate [1731] evidentary support for a judgment in favor of the plaintiffs. This is where Judge Keith made a mistake or his law clerk did. He says as the Tennessee Supreme Court noted in Jones versus Seale (spelled phonetically), and that's a Tennessee Appeals report, so it was not the Supreme Court. He says, the facts and circumstances proved at trial must clearly establish the inference of

fraud. A jury cannot render a verdict on the basis of speculation, surmise or conjecture. Therefore, the District Court should have granted defendant's motion for judgment NOV with respect to the award of compensatory damages, which was in effect throwing the whole thing out.

Now, it seems to me that in this case there's only one factual—well, I shouldn't say that. Mr. Walters is the primary factual witness for the plaintiffs, and I'm calling him a plaintiff in behalf of Tentex. The plaintiffs, of course, used Mr. Dudley and Mr. Whitsett as some fact witnesses although Mr. Whitsett was hardly a fact witness with regard to the details of this. But Mr. Walters was, therefore, cast in a role which he was not able to speak with knowledge [1732] about some of the things that might shed some light on the intent of whoever is supposed to have committed the fraud whether it was Mr. Dudley, Mr. Whitsett, Mr. Bloom.

Fraud requires specific intent. It requires it in the degree of proof more than just prima facie or getting it to the jury on preponderance of the evidence. The active parties for the defendant in my opinion just have not been shown to have acted with falsity, doing things falsely and with the intent to deceive or with intent to injure, knowingly doing that. I just don't believe it's fair. Fraud is a serious thing particularly when the next fraud we are going to get to is criminal fraud. It's not brought as criminal fraud but that's what it's accused of.

It dawned on me after hearing all of this whether you're talking about how the prime was decided, how the notes were picked up and whether there was a Subchapter S corporation or whether there wasn't, that

doesn't have anything to do with any inducement to sign these notes or with any inducement to give up anything by Mr. Walters or Tentex. So much of this proof is addressed to trying to get some little nick in the accuracy of [1733] the bank officials that really is not enough to meet the basic test of knowing false statements to the injury of somebody else.

There are a couple of places where the simpler form of fraud or the more serious kind of the breach of a fiduciary duty might have been brought up but it seems to me that these duties—now, the duty to sell the note. I don't think the bank had any duty in the total circumstances to sell that note particularly since they had to get the permission of Fischer. They were consulted about it. Obviously par was going to be very hard to come by and it wasn't a very realistic thing, but this was a very complex deal. And we also have to recognize that Mr. Walters many times was vague in his statements and, gosh, the number of times he testified what prime rate meant to him, you could just—that went on and on. He never did say it the same way twice for a long time. Finally he admitted that the way it was defined in the 475 note was his idea of fraud if you would give 90 days a little leeway. I think possibly it was meant to.

It seems to me that when you get down to it this Court is faced with the same thing that * * *

* * *

* * * [1794] you'll allow me to try to explain, I'm going to read part of this. I think I'll just—so the arguments will be more meaningful I'm going to read a portion of what I intend to re-read later. I think I have—

ladies and gentlemen, I think I have tried to tell you, I know I have tried to tell you. I think I have told you that we've been wrestling over some questions of law on the multitude of issues that came up in this case that have some relatively new principals (sic) of law in the history of the common law or even the statutory law. But, that's not for you to say.

Let me just read what I'm going to re-read later before the attorneys start their closing arguments. I think maybe I'll just tell you what the closing arguments—at this stage of the case when before we submit to you any matters for you to resolve the attorneys get to argue the case, that is to summarize the proof pertinent to the issues that are being submitted.

As I've told you from the beginning, the plaintiff has the burden of proof [1795] by a preponderance of the evidence to establish his claim. Because that burden of proof is placed by the law on the plaintiff in this phase of the case the plaintiff's lawyer gets to open and close the summaries. That is to say Mr. Parrish will address you first and then Mr. Bearman will address you. After Mr. Bearman has addressed you Mr. Parrish may again address you but this time he is limited to what—undertaking to reply to what Mr. Bearman said. Obviously it wouldn't be fair to let a plaintiff's lawyer come in after the defendant's lawyer has addressed you and bring up something new. So, these lawyers understand that rule.

Although we sometimes have objections to the scope of the argument, that's the reason that one lawyer gets to address you twice and the other one only one time. Mr. Bearman, of course, will have to reply to Mr. Par-

rish's first remarks and then call to your attention such matters as he thinks are appropriate.

Now, there's only one phase of this case which requires your assistance. The * * *

* * *

* * * [1868] defendant, First Tennessee Bank, knowingly take or receive from or charge to the plaintiff, William S. Walters, Jr., interest in excess of the lawful rate on the $475,000.00 note signed May 3, 1979 between the date of its signing and December 2, 1980? Yes or no.

This part of the case was brought pursuant to the United States laws applicable to national banks, more particularly Title 12 of the United States Code, Sections 85, 86 and 86A. These laws make it unlawful for a national bank knowingly to take, receive or charge interest at a rate in excess of the amount set forth in the federal laws, which laws refer to and for some purposes adopt the maximum rate of lawful interest under the laws of the state where the national bank is located.

The penalty provided for taking usurious interest is repayment of double the amount of usurious interest paid within two years of the suit being filed and forfeiture of all interest which the debt covers or which has been agreed to be paid. Usury under the federal law is knowingly taking, receiving or [1869] charging more than the maximum lawful rate of interest. The word knowingly means intentionally receiving interest in excess of the amount authorized by appropriate law. Knowingly does not include collecting interest above the lawful amount due to a mistake of fact or by an unintentional error or fact.

The charges which are claimed to be knowingly excessive before December 2, 1980 are the ones which have been sometimes referred to as overcharges. The bank admits that it made some erroneous overcharges but it contends they were unintended errors and not excessive interest charges which were knowing.

Of course, the plaintiff contends otherwise and claims that the question submitted to you should be answered yes. In a case of this kind the law imposes upon the plaintiff the burden of proving the essential elements of his claim by a preponderance of the evidence. In this case that means the plaintiff must prove by a preponderance of the evidence that it is more likely that the answer to the question submitted to you is yes than an * * *

(Filed October 14, 1988)

CASE NOS. 86-6031/32/33

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM S. WALTERS, JR., et al.,
Plaintiffs-Appellants,

vs.

FIRST TENNESSEE BANK, N.A. MEMPHIS
AND DOES 1 THROUGH 99,
Defendants-Appellees.

ORDER

Before: NELSON, NORRIS, CIRCUIT JUDGES, PECK, SENIOR CIRCUIT JUDGE

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/snt
Leonard Green, Clerk

12 U.S.C. § 85

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged

at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

(R. S. § 5197; June 16, 1933, c. 89, § 25, 48 Stat. 191; Aug. 23, 1935, c. 614, Title III, § 314, 49 Stat. 711; Oct. 29, 1974, P. L. 93-501, Title II, § 201, 88 Stat. 1558.)

12 U.S.C. § 86. Usurious interest; penalty for taking; statute of limitation

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section [12 USCS § 85], when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided such action is commenced within two years from the time the usurious transaction occurred.

(R. S. § 5198 in part.)

12 U.S.C. § 86a. Business or agricultural loans, rate limitation

(a) If the applicable rate prescribed in this section exceeds the rate a person would be permitted to charge in the absence of this section, such person may in the case of a business or agricultural loan in the amount of $1,000 or more, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any such loan, interest at a rate of not more than 5 per centum in excess of the discount rate, including any surcharge thereon, on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the person is located.

(b) For the purpose of this part [12 USCS § 86a and note]—

(1) the term "loan" includes all secured and unsecured loans, credit sales, forbearances, advances, renewals or other extensions of credit made by or to any person or organization for business or agricultural purposes;

(2) the term "interest" includes any compensation, however denominated, for a loan;

(3) the term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, association, or other entity; and

(4) the term "person" means a natural person or organization.

(c) If the rate prescribed in subsection (a) exceeds the rate such person would be permitted to charge in

the absence of this section, and such State imposed rate is thereby preempted by the rate described in subsection (a), the taking, receiving, reserving, or charging a greater rate than is allowed by subsection (a), when knowingly done, shall be deemed a forfeiture of the entire interest which the loan carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover, in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of interest paid from the person taking, receiving, reserving, or charging such interest.

(Mar. 31, 1980, P. L. 96-221, Title V, Part B, § 511, 94 Stat. 164; Oct. 8, 1980, P. L. 96-399, Title III, § 324(b)(d), 94 Stat. 1648.)

Tenn. Code Ann. § 47-14-103(2) (1979)

(2) For all written contracts, signed by the party to be charged, and not subject to subparagraph (1) of this Section, the applicable formula rate; provided, however, that in no event shall the applicable formula rate exceed eighteen percent (18%) per annum; and

Public Law 96-161-Dec. 28, 1979, 93 Stat. 1237-1238, § 205

Sec. 205. (a) In order to prevent discrimination against any financial institution chartered pursuant to the statutes of the United States with respect to interest rates, if the applicable rate prescribed in this section exceeds the rate such federally chartered financial institution would be permitted to charge in the absence of

this section, the federally chartered financial institution may in the case of business or agricultural loans in the amount of $25,000 or more, notwithstanding any State constitution or statute, which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan, interest at a rate of not more than 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the federally chartered financial institution is located.

(b) If the rate prescribed in subsection (a) exceeds the rate such federally chartered financial institution would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a), the taking, receiving, reserving, or charging a greater rate than is allowed by subsection (a), when knowingly done, shall be deemed a forfeiture of the entire interest which the loan carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover, in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of interest paid from the federally chartered financial institution taking or receiving such interest.

Public Law 96-161-Dec. 28, 1979, 93 Stat. 1240, § 213

Sec. 213. Notwithstanding any other provision of this title, subject to sections 207 (2) and (3) and 211 (2) and (3) of this Act and section 308(h)(3)(B) and (C) of the Small Business Investment Act of 1958, the provisions of this title shall continue to apply until July 1,

1981, in the case of any State having a constitutional provision regarding maximum interest rates.

Public Law 96-221-March 31, 1980, 94 Stat. 164, § 512

Sec. 512. The provisions of this part shall apply only with respect to business or agricultural loans in amounts of $25,000 or more made in any State during the period beginning on April 1, 1980, and ending on the earlier of—

(1) April 1, 1983; or

(2) the date, on or after April 1, 1980, on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the provisions of this part to apply with respect to loans made in such State,

except that such provisions shall apply to any loan made on or after such earlier date pursuant to a commitment to make such loan which was entered into on or after April 1, 1980, and prior to such earlier date.

Public Law 96-221-March 31, 1980, 94 Stat. 168, § 529

Sec. 529. Effective at the close of March 31, 1980, Public Law 96-104, section 105(a)(2) of Public Law 96-161, and the amendments made by and the provisions of title II of Public Law 96-161 are hereby repealed, except that the provisions of such Public Law, the provisions of such section, the amendments made by such title, and the provisions of such title shall continue to apply to any loan made, any deposit made, or any obligation issued in any State during any period when those provisions or amendments were in effect in such State.

(c)(1) Section 512 of such Act is amended—

(A) by inserting "(a)" after "Sec. 512."; and

(B) by adding at the end thereof the following:

"(b) A loan shall be deemed to be made during the the period described in subsection (a) if such loan—

"(1)(A) is funded or made in whole or in part during such period, regardless of whether pursuant to a commitment or other agreement therefor made prior to April 1, 1980;

"(B) was made prior to or on April 1, 1980, and bears or provides for interest during such period on the outstanding amount thereof at a variable or fluctuating rate; or

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 86-6031

WILLIAM S. WALTERS, JR.,
Plaintiff/Appellant,

v.

FIRST TENNESSEE BANK, N.A. MEMPHIS, et al.,
Defendants/Appellees.

Appeal From the United States District Court
for the Western District of Tennessee,
Western Division, at Memphis
United States District Judge Robert M. McRae, Jr.

OPENING BRIEF OF APPELLANT, WILLIAM S. WALTERS, JR.

ORAL ARGUMENT REQUESTED

Larry E. Parrish
PARRISH & MULROONEY, P.C.
Twenty-First Floor
First Tennessee Building
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Memphis, Tennessee 38103
(901) 526-7777

STATEMENT OF THE ISSUES

I. Did the district court err in **granting a judgment notwithstanding** the jury's verdict?

II. Did the district court err in its **ruling** that surcharge statutes permit the Bank to collect more interest than permitted by a contract?

III. Did the district court err in reversing its initial **ruling** that surcharge statutes did not take effect in Tennessee until 1981?

IV. Did the district court err in ruling that Walters was not entitled to the benefit of the first breach rule?

V. Did the district court err in **ruling** that the promissory note was a contract?

VI. Did the district court, **by directing a verdict,** err in taking from the jury whether the announced prime rate of the Bank was higher than the Bank's prime rate?

VII. Did the district court, **by directing a verdict,** err in taking from the jury whether the Bank possessed the requisite intent to be liable under 18 *U.S.C.* §1964(c)?

STATEMENT OF THE CASE

William S. Walters, Jr. ("Walters") made a loan [R. 113(W): Jt. P-T Order at p. 11(e)] for $475,000 from First Tennessee Bank ("the Bank") on May 3, 1979 (Walters at TR 104, l. 12-21), evidenced by the Note [Exh. 3; R. 113(W): Jt. P-T Order at p. 12(f) and (g)] which provided:

> The term "**prime rate**" shall be deemed to **mean that rate of interest per annum charged by the Bank on 90 day borrowings by corporate borrowers with the highest** credit standing for commercial loans, such "prime rate" **being, as of the date hereof,** eleven and 3/4 percent (11.75%) per annum.

The Bank publishes a rate which it calls "prime rate," and it fluctuated [R. 113(W): Jt. P-T Order at p. 14(l) and [2*] (m); Exh. 10]. On May 3, 1979, the rate *published*[1] was 11.75% (Exh. 10; Walters at TR 148, l. 22-25; 149, l. 1-12; 723, l. 6-10; 625-625 (sic); 877-879).

The $475,000 was advanced on May 3, 1979, immediately after execution of the Note, to TenTex Marine, Inc. (Walters at TR 169-170, l. 1-2; 175, l. 4-9; 193, l. 11-25; 322, l. 18-24; 469, l. 18-25; Exh. 6a). Walters pledged a note (the "Fischer note") from Fischer Lime and Cement ("Fischer"), which had a balance far in excess of $475,000 (Walters at TR 76, l. 3-21; 190, l. 14-25; 191, l. 1-2). The Bank collected the Fischer note and applied what it collected to the Note (Walters at TR 191-193, l. 1-10).

The Fischer note yielded a $9,556.53 payment each month with $10,000 payment, in addition, on January 26, 1981. From the first Note payment through September 17, 1982, the Bank collected $287,664.76 [R. 113(W):

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*Numbers in brackets are the original typed page numbers.

1. When reading this brief, "the Bank's prime rate" and "what the Bank *published* as its prime rate" are different thoughts. The tendency is to read the words with the underlying premise that, when the Bank *publishes* a rate, that rate is its prime rate. The prime rate fraud theory rests on the proposition that what the Bank *publishes* is a rate different from and higher than the Bank's prime rate.

Jt. P-T Order at p. 28] and credited it as if it were interest (Exh. 5; Walters at TR 157-161). There was one credit of $215.84 to principal, on October 18, 1982 Exh. 5; Walters at TR 160).

The Note's detailed repayment schedule provided that the first interest payment was due June 25, 1979, and the twenty-fifth day of each September, December, March and June thereafter. The first principal payment was due March 25, 1980, and the twenty-fifth day of each June, September, December [3] and March thereafter with liquidation on March 25, 1987.

The March 1980 principal payment was not paid. Prior to March 1980, Walters was in full compliance with each term of the Note. On May 23, 1980, the Bank wrote to Walters declaring a default for non-payment of the March 1980 principal payment, though interest continued to be collected monthly from Fischer. The Bank made no attempt to accelerate [R. 107(W): Pf.'s Mem., Ex. A; Walters at TR 212, l. 22-25; 213, l. 1-16]. Accrued interest was to zero on occasion (Exh. 6h; Walters at TR 218-220; 22, l. 15-23).

The Fischer companies (businesses owned by Walters' family) are prime rate borrowers of the Bank (Walters at TR 54, l. 2-17), and Walters accompanied his father many times in the negotiation of commercial loans (Walters at TR 50, l. 4-10). Upon the death of his father, Walters assumed the position reserved for the Fischer companies on the Board of the National Bank of Commerce and served actively for ten years (Walters at TR 91, l. 3-25; l. 3-25 (sic); 92, l. 1-120; Exh. 7).

The term "prime rate" was as familiar to Walters as the most common words used in everyday parlance

(Walters at TR 99, l. 20-25; 100 l. 1-11; 147, l. 16-20; 148, l. 12-21; 149, l. 6-12; 379-380; 619-620; 475, l. 15-20), and, to him, its meaning was clear. When used in the Note, Walters testified that it conveyed to him that the index, by whatever terminology, (i.e., the base, the benchmark, or the reference rate) for the rate (130% x the Bank's prime) was the lowest rate outstanding, at the time of any variance, at which the Bank extended short-term business loans.

[4] Proof introduced by Walters supported that the definition of "prime rate" is, and has been since its inception, consistent with what Walters testified (Walters at TR 99, l. 20-25; 100, l. 1-11; 147, l. 16-20; 148, l. 12-21; 149, l. 6-12; 379-380; 619-620; 475, l. 15-20). The testimony of a money and banking expert (Auerbach at TR 763-794) was confirmation of Walters' definition. Dr. Auerbach testified that the qualifiers in the Note are terms of art used in commercial lending to do no more than further explicate how the Bank determines which is its lowest short-term commercial loan rate (Auerbach at TR 843, l. 16-851, l. 16). The prime rate is definitionally (Auerbach at TR 907-933) tied to "short term commercial loans" (Auerbach at TR 907-933; Exhs. 62-70).

The Bank calculated the interest it claimed was owed using, as the base, the rate *published*. This rate was not tied in any way to the lowest rate (Dudley at TR 1504-1514). The Bank consistently contended that the "prime rate" terminology in the Note did not convey a promise that the Bank would charge Walters a rate based on its lowest rate (Dudley at TR 1504-1514). The Bank considered there to be no contractual constraints on it governing what it published as its prime (R. 108(W): Pf.'s Mem. at p. 3).

The Bank admitted full responsibility for calculating the amount of interest (Walters at TR 311, l. 20-25; 312, l. 1-5) owed by Walters and advising him thereof by United States mails [R. 113(W): Jt. P-T Order at pp. 13-14(k)]. The Bank was the exclusive repository for the information revealing the lowest rate (Walters at TR 310-312) for a short-term [5] commercial loan by it. Walters testified that he depended completely on the Bank to honestly calculate and advise him of the amount owed as interest (Walters at TR 311, l. 20-25; 312, l. 1-5).

The instant case was commenced by complaint, with usury [R. 1(W): Cmplt.], filed on May 28, 1982, individually. On July 19, 1982, the Bank filed its answer and counterclaim [R. 17(W): Answer] to the First Amended Complaint [R. 9(W)] which, when filed on June 28, 1982, dropped the usury claim. The Bank denied liability on all claims [R. 17(W): Answer]. Walters denied default (R. 22(W): Answer).

As a stakeholder, Fischer instituted an interpleader on October 19, 1982 naming as defendants Walters and the Bank. On November 23, 1982, Walters answered [R. 4(F): Answer] and included a crossclaim against the Bank alleging usury. Thus, the usury claim was made initially on May 28, 1982 and repled, as a crossclaim in the interpleader, on November 23, 1982.

On December 23, 1983, Walters filed a Motion to Consolidate [R. 46(W)] three simultaneously pending causes of action between Walters and the Bank. On January 3, 1984, an order [R. 48(W)] was entered consolidating. On October 1, 1984, the Bank filed a motion

[R. 75(W): Mot. to Dispose] which, among other things, urged that the usury crossclaim be barred by the statute of limitations. Walters responded [R. 80(W): Supp. of Walters to Mem.] in opposition on October 31, 1984, and with a motion to amend [R. 83(W): Mot. for Leave]. On August 9, 1985, the district court ordered [R. 101(W): Order] that the statute of limitations barred only those acts of [6] usury occurring prior to May 22, 1980.

Walters' crossclaim for usury was tried resulting in a verdict for Walters [R. 120(W): Verdict] and judgment notwithstanding the verdict [R. 130(W): Judgment] was entered against Walters. Walters' non-usury claims, and the usury claims for collections after October 8, 1980, were disposed of by directed verdict (9-4-85 Min. Ent.; 9-6-85 Min. Ent.).

On January 13, 1986, Walters paid money to the Bank, pursuant to an agreement [1-9-86 Min. Ent.; R. 98(W): Consent Order]. This mooted the Bank's counterclaim [R. 98(F): Consent Order]. The Bank has not appealed.

On January 7, 1983, Walters filed a motion for summary judgment with an affidavit [R. 16(F): Aff.] and memorandum of law [R. 14(F): Mem.] seeking a judgment against the Bank for usury. The Bank opposed [R. 26(F): Resp. to Mot.] with an affidavit [R. 28(F): Aff.] and a memorandum [R. 27(F): Mem.). Walters attempted to refute the Bank's affidavit with the deposition of the affiant [R. 31(F): Dep. of Dudley] and a reply memorandum [R. 30(F): Reply]. The court denied the motion because whether the overcharging was "knowingly" done was in dispute [R. 101(W): Order].

Walters claimed that the Bank lost all rights under the Note (Exh. 3) when the Bank first breached the the Note by overcharging (Exh. 5; Exh. 12) before March 1980, when Walters was in full compliance. Walters filed a memorandum [R. 107(W): Pf.'s Mem.] explaining the first breach. This was [R. 113(W): Jt. P-T Order at p. 18(r), p. 19(t)] a contested issue.

The district court reacted to the first breach theory [7] with the comment that it had no application except to anticipatory breaches (TR 1780, l. 1-7). The district court noted that the prime rate practices of the Bank constituted an **arguable breach of contract** (TR 1740, l. 1-2) and invited further argumentation on the first breach (TR 1746, l. 22-1749, l. 3) but remained firm in its refusal to deem it relevant (TR 1727, l. 14-18).

Also among the contested issues was whether the Note (Exh. 3) is so indefinite that it fails as a contract [R. 113, p. 18(n), p. 21(d), p. 24(r), p. 35(eee)]. This issue was injected by the Bank (Auerbach at TR 907-933) and arose because of Walters' contention with respect to "prime rate" [R. 113(W): Jt. P-T Order at subsection 1, pp. 48-51; p. 24(s); p. 20(a); p. 8; R. 39 (T): Aff.; R. 16(F): Aff.; Walters at TR 99, l. 20-25; 100, l. 1-11; 147, l. 16-20; 148, l. 12-21; 149, l. 6-12; 379-380; 612-620; Auerbach at TR 843-851].

In response, the Bank asserted that the words "prime rate" communicated nothing more than that rate which the Bank **wished to choose** as a benchmark irrespective of what its lowest short-term commercial rate might, at the time, be. According to the Bank, there existed no rate so high which, if chosen by the Bank as its "prime rate" and made use of to calculate Walters' interest,

would breach the Note [R. 108(F): Pf.'s Mem. at pp. 2-3; R. 113(W): Jt. P-T Order at p. 10].

The one person responsible for selection of a rate to be published as the Bank's prime rate admitted that the rate represented his subjective (Whitsett at TR 1256-1262) evalu- [8] ation of economic conditions he deemed significant in light of the business objectives of the Bank [R. 34(W): Dep. of Whitsett at pp. 46, 50, 75, 76].

The district court noted that the prime rate was the rate for the **most** creditworthy borrowers (TR 1738, l. 20-22). The Bank testified that the Bank's prime rate borrowers were "very sizable highest creditworthy customers" (Dudley at TR 1450) and that "the names . . . would be easily recognizable." The Bank testified: "They're large, obviously large corporate borrowers" (Dudley at TR 1451). They were described as borrowers who "pay our prime rate" (Dudley at TR 1452). Oath was made that the rate at which some borrowed was sometimes *less than* what the Bank **announced** (Exhs. 96, 97, 98, 99). The Bank testified that **most,** though a superlative, did not identify the *one* which stood out because of its uniqueness in comparison with those with which it was being compared (Dudley at TR 1589-1599).

Walters does not claim to be in the prime rate category, but merely that the base rate by which his variable rate fluctuates is the rate extended to the "most" creditworthy borrower with the "highest" creditworthiness. The increment between that rate and the rate charged Walters represents the degree by which Walters' creditworthiness is less than the borrower with the "highest" creditworthiness.

When asked whether a prime rate of a bank could ever be nothing more than a rate a bank announces, the only money and banking expert who testified responded as follows at TR 945:

> [9] I don't see how you put something in a contract which you can't define (Auerbach at TR 839-841) to me.

The Bank never modified this position. In light of this, Walters urged the district court to rule that the Note failed to meet the essential minimum requirement of definiteness to constitute a contract. Walters supported his position with memoranda explicating the requirements of law [R. 108(W): Pf.'s Mem.; R. 114(W): Pf.'s Reply], and the Bank responded [R. 115(W): Def.'s Mem.].

The district court made the following pertinent observations at TR 280, l. 20 - 281, l. 3:

> This . . . establishes that . . . there is no way a borrower could figure out what prime was from the four corners of that instrument. . . . I think that is pretty indefinite.

Next, as follows at TR 652, l. 17 - 653, l. 14:

> . . . you all wouldn't tell him who the corporate borrowers were. . . . How in the world is somebody suppose to test that definition?
>
> * * *
>
> Well, . . . you are convincing me pretty thoroughly that . . . that thing was so indefinite, . . .

Next, as follows at TR 1071, l. 19 - 1072, l. 1:

> . . . they are on the way to being honest about what prime means. I looked up prime in the **dictionary** last night. . . . Prime, as an adjective, *means* among *the best.* And that is what you take it to mean.

The district court stated as follows at TR 174, l. 11-19:

> 'Well, this is a good ole' boy. We're not going to lose any money. Let's **forget** the **prime.** Let's **get** [10] his **business.** Or, we might get his daddy's business or somebody else's.'

The district court made the following observation at TR 1141, l. 9-14:

> . . . there is a very, very, **very strong issue on** the law question of **indefiniteness** because of the nature of this relationship and what the thing says, the definition. (emphasis added)

The district court foreshadowed its ultimate ruling with the following words at TR 1173, l. 12-21:

> You've *got to find out some more about how prime was calculated* to find out whether or not this was . . . so indefinite that it should be stricken from the contract.

Finally, the district court ruled as is recorded at TR 1724, l. 22 - 1725, l. 16:

> . . . threshold . . . is this motion . . . as to whether or not the note . . . was so indefinite that it did not constitute a contract . . . . [m]y reaction to it . . . is that I don't believe that this note triggers this unusual and bold approach *for me to void this contract* . . .

The final words are at TR 1727, l. 11-13:

This takes care of the . . . indefiniteness question . . . .

Usury was [R. 113(W): Jt. P-T Order at p. 3, pp. 8-9, p. 20(y), p. 28(ff), p. 31 (qq), p. 32(tt), p. 33(zz), p. 34(bbb), p. 34 (ccc), p. 34(ddd), p. 35(eee), p. 37(jjj)] contested, and the trial proceeded on all usury claims for any acts of usury which occurred after May 27, 1980 [R. 101(W): Order at p. 12; R. 113(W): Jt. P-T Order at p. 5(b)].

The district court explicitly considered the claim of Walters that, if the surcharge statute permitted the Bank to [11] increase the amount it could exact to an amount higher than the Note rate, the right of Walters not to have property taken from him without the due process [R. 116 (W): Walters' Trial Mem. at pp. 21-22] would be violated. The district court rejected this (TR 1174, l. 15 - 1175, l. 2).

Once the district court ruled out all usurious charges over 18% after October 8, 1980 (surcharge exemptions), the only thing left for resolution were charges for 32 days at over 18% between May 28, 1980 and October 8, 1980. (Exh. 12; Walters at TR 390-403).

The only contested issue submitted to the jury was whether the Bank "knowingly" charged the excessive interest on those 32 days. The jury was instructed that "knowingly" was defined as follows at Tr. 1868:

> These laws make it unlawful for a national bank **knowingly** to take, receive or charge interest at a rate in excess of the amount set forth in the federal laws.

* * *

[at TR 1869] The charges which are claimed to be knowingly excessive before December 2, 1980 are the ones which have been sometimes referred to as overcharges. The **bank admits** that it made some erroneous **overcharges** but it **contends** that they were **unintended** errors **and not** excessive interest charges which were **knowing.**

* * *

[at TR 1874] The means of knowledge are ordinarily the equivalent in law to knowledge. That is to say the law will charge a person with notice and knowledge of **whatever he would have learned upon making such inquiry as it would have been reasonable to expect** him to make under the circumstances. You may consider it reasonable to draw the **inference** and find that a person **intends the natural and probable consequences** of acts knowingly done or knowingly omitted.

* * *

[13] On or about **September 27,** 1982, Walters provided the Bank with his recapitulation (Exh. 89 I.D.) of a day-by-day breakdown, specifying the exact amount of overcharge by the Bank. Ten days earlier, the Bank had received the monthly payment of $9,556.53 but had not made its final posting.

On **October 18,** 1982, the Bank posted the $9,556.53 payment received on September 17, 1982. The posting reflected that the money collected was credited to interest. This credit resulted in there being no unpaid interest (Exh. 5).

Thus, **after** receipt of the detailed information about the overcharges subsequently found by the jury to have

been knowingly made, the Bank continued to collect interest and make credits, without any corrective entries for the 32 days.

Between October 18, 1982 and August 26, 1985, the deposition of the Bank was taken on three separate occasions [R. 31(F); R. 109(W): R. 38(T): Dep. of Dudley] and, on each of those occasions, the day-by-day breakdown of overcharges was a subject of detailed inquiry [R. 31 (F); R. 109(W): R. 38(T): Dep. of Dudley]. On September 27, 1983, the Bank provided an affidavit [R. 28(F): Aff.] attempting to justify the overcharges but never offering to make any corrective entries. Subsequently [R. 30(F): Reply], Walters filed a memorandum addressing every point raised by the Bank attempting to show that the posited reasons supposedly excusing the overcharges were not well found [R. 78(W): Resp. of Walters at pp. 6-18; pp. 26-39].

On August 26, 1985, [R. 113(W): Jt. P-T Order at p. 10] the Bank stated what it claimed was owing and included all of [14] the overcharges (including the 32 days) previously detailed to the Bank.

The Bank made affidavit [R. 29(F): Aff.] and repeatedly testified that there were thousands of promissory notes like the Note. An exhibit (Exh. 9) listed over 6,500 separate short-term commercial loans, for $50,000 or more, at rates less than the then *announced* prime rate. This showed numerosity. Proof [R. 31(F): Dep. of Dudley at p. 62, l. 2] stressed that Walters was treated no differently than the other prime based borrowers.

As concerns the 208 days of overcharges commencing December 4, 1980, the Bank did not attempt to defend on the basis of lack of knowledge. The Bank claimed that

these overcharges were knowingly exacted but justified by its interpretation of the law [R. 78(W): Resp. of Walters at pp. 12-15, 17-18; R. 31(F): Dep. of Dudley at pp. 65-66]. With respect to the 32 days of overcharges, the Bank defended on the basis that these overcharges, in addition to being the result of a mistake of fact, were excused because, on other occasions, the Bank charged less than the law permitted in a sufficient amount to offset the overcharges (Dudley at TR 1556-1557).

The Bank never identified who at the Bank made the mistake of fact (Dudley at TR 1541, l. 7-11). The Bank made oath that it is impossible to know that information (Dudley at TR 1541-1546). The loan officer admitted that he had no knowledge concerning computers (Dudley at TR 1537, l. 20-25) but did not hesitate to make oath that the mistake was an error by the computer (Dudley at TR 1537, l. 1-15). What [15] kind of computer error, when the computer error was made and who was responsible for making the computer error were subjects which the Bank testified were unknowable (Dudley at TR 1350, l. 11-12, 23-25; 1538, l. 22-23).

When asked how he knew that a mistake had been made, the Bank spokesman testified that he worked for an **honest employer** which would **not hire employees who** would **violate** the **law** [R. 31(F): Dep. of Dudley at pp. 59-60; R. 78(W): Resp. of Walters at p. 8]. The district court refused to admit tendered evidence (TR 1655-1657; Exh. 90 and 91 I.D.) that, in 1978, the Bank had been convicted, after jury trial, of a federal felony involving dishonesty to cover up illegal bribe payments (TR 1656).

The representative testified [R. 31(F): Dep. of Dudley at p. 34] that these overcharges occurred during a

time when the Bank made many announcements at close intervals stating, as its prime rate, a rate different from the rate which it had stated in the previous announcement. The witness admitted (Dudley at TR 1346, l. 18-22) that he was the person designated by the Bank to make certain that the correct amount of interest was charged and collected (Dudley at TR 1601, l. 6-24; 1651, l. 9-27). He further made oath that the computer used by the Bank was antiquated and, because of this, unable to effectively record the necessary changes. He testified that his travel schedule and the frequency of the changes meant that it was impossible for him to perform more efficiently (Dudley at TR 1564, l. 5-18).

Walters claimed that the Bank engaged in a scheme, the object of which was to obtain from Walters, without his know- [16] ledge, more money than Walters agreed to pay as interest by deceiving Walters into believing that the Bank was entitled to the money charged and received by the Bank [R. 113(W): Jt. P-T Order at p. 22(j)].

By way of common law claims, Walters alleged tortious misrepresentation [R. 113(W): Jt. P-T Order at p. 21(c); R. 113(W): Jt. P-T Order at p. 20(a); R. 113 (W): Jt. P-T Order at p. 19(x)] and that the Bank breached a confidential relationship and a trust with Walters [R. 113(W): Jt. P-T Order at p. 26(aa); R. 113(W): Jt. P-T Order at p. 27(bb); R. 113(W): Jt. P-T Order at p. 27(cc); R. 113(W): Jt. P-T Order at p. 33(vv); R. 113(W): Jt. P-T Order at p. 33(ww); R. 113(W): Jt. P-T Order at p. 21(f); R. 113(W): Jt. P-T Order at p. 21(e); R. 113(W): Jt. P-T Order at p. 14; R. 113(W): Jt. P-T Order at p. 9-10; R. 113(W): Jt. P-T Order at p. 27(dd); R. 113(W): Jt. P-T Order

at p. 33(uu); R. 113(W): Jt. P-T Order at p. 20(a); R. 113(W): Jt. P-T Order at p. 20(b); R. 113(W): Jt. P-T Order at p. 24(s); R. 113(W): Jt. P-T Order at p. 27(dd); pp. 48-51; R. 113(W): Jt. P-T Order at p. 113 p. 20(a)]. The breach of confidential relationship and trust is predicated on the allegation that the Bank failed in its obligation to honestly compute the interest owed and accurately advise Walters thereof.

The district court directed a verdict on all RICO and ancillary claims (9-6-85 Min. Ent.). As to the misrepresentation allegations, the district court explicitly cited *United States v. Schilling*, 561 F.2d 659 (6th Cir. 1977) [TR 1737, l. 17-21] and *Gold v. National Savings Bank of the City of Albany*, 641 F.2d 430 (6th Cir. 1981) [TR 1729-1731] as its [17] mandate (TR 1778) to direct a verdict.

The absence of a scheme was found because absence of prerequisite intent was found. There **were mailings** which furthered the activity (TR 1735, l. 2-5), which was characterized as an **"arguable breach of contract"** (TR 1740, l. 1-2), but, for lack of intent, not in violation of §1341.

On intent, the district court remarked at TR 1732, l. 5-8, 12-16:

> The law requires **specific intent.** It requires it in the degree of **proof more than** just prima facie or getting it **to the jury** on **preponderance** of the evidence.

The district court continued at TR 1733, l. 2-3:

> [t]he basic test of knowing false statements **to the injury** of somebody else.

The district court stated at TR 1742, l. 11-12:

> But there is no authority anywhere that gets away from the **criminal intent to violate the law** and that has to be something **wicked,** unlawful and deliberate.

The ruling is based on the absence of intent in the specific individuals by its remarks at TR 1732, l. 2-4:

> [t]he **intent of** whoever is supposed to have committed the fraud whether it was Mr. **Dudley,** Mr. **Whitsett,** Mr. Bloom.

The district court continued at TR 1732, l. 8-12:

> The active parties . . . just have not been shown to have acted with falsity, doing things falsely and with the **intent to** deceive or . . . to **injure,** knowingly doing that.

The district court said of the individuals at TR 1742, l. 1-5:

> But I can't find any **fraudulent act on** [18] the **part of** these **individuals,** . . . .

The district court most pointedly said at TR 1738, l. 6-12:

> Those **men thought they were doing the right thing.** They **believed** this was what the bank was **supposed to** do . . . I'm talking about Mr. **Whitsett** and Mr. **Dudley** . . .

The intent was seen as missing in the individuals because the prime rate was viewed as nothing more than what the Bank announced (TR 1737, l. 12; 1739, l. 9; 1726, l. 15-23). It was stated that the Bank's **prime rate**

could not be interpreted as the **"lowest"** rate. Early, the district court used a dictionary (supra at 9) to illustrate that "prime rate" meant the **"best."** Later, the district court stated that "there's only one prime rate," (nobody ever claimed that there was more than one prime rate) and used the dictionary to support that "prime" and "lowest" could not be the same at TR 139, l. 10-25:

> Prime rate, I looked it up . . . - *Webster's Dictionary*, ... Prime does mean first in excellence, of highest quality, as prime wheat, a prime quality cloth. . . . There's another one that's akin to it, that's first in degree, rank, dignity or employment.

The district court remarked, concerning Dr. Auerbach, at TR 1726 l. 24, 1727, l. 6:

> . . . my reaction is that that's a matter for Congress and I wish him [Dr. Auerbach] well in his efforts to try to have some . . . legislation adopted because I think it's . . . **unfair** . . . **invites problems** when . . . loans are keyed to **this prime rate** and . . . you get into something like Mr. Walters did . . . .

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 86-6031

WILLIAM S. WALTERS, JR.,
Plaintiff/Appellant,

v.

FIRST TENNESSEE BANK, N.A.
MEMPHIS, et al.,
Defendants/Appellees.

Appeal from the United States District Court
for the Western District of Tennessee,
Western Division, at Memphis
United States District Judge Robert M. McRae, Jr.

APPELLANT'S PETITION TO REHEAR

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APPELLANT'S PETITION TO REHEAR

ISSUE ONE

From all that can be gleaned from this court's slip opinion, it appears that, for a reason not able to be substantiated in the record, this court failed to review that portion of the decision of the trial court relative to usury charged by the Bank for 208 consecutive days as to which the Bank fully admitted full knowledge and intent to charge that which it charged and collected. The Bank did not even attempt to argue that the rate charged and the amount collected was the result of a mistake of fact. The Bank conceded that if what it charged was usury, it was a usurious overcharge based on a mistake of law but did not admit that its interpretation of the law was error.

It, likewise, is undisputed that usury charged as a result of a mistake of law is unexcused. In other words, a mistake of law which results in exacting usury is irrelevant.

In his opening brief, on page 14, Walters, as a part of his statement of the case, noted as follows:

> [2*] As concerns the 208 days of overcharges commencing December 4, 1980, the Bank did not attempt to defend on the basis of lack of knowledge. The Bank claimed that these overcharges were knowingly exacted but justified by its interpretation of the law [R.78(W): **Resp.** of Walters at pp.12-15, 17-18; R.31(F): Dep. of Dudley at pp.65-66].

Subsequently, in his brief, Walters discussed the second enumerated issue with the following references at pp. 31-32:

> Subsequently, federal legislation, purporting to override state law, was enacted purporting to permit the Bank to charge interest in excess of the maximum which the Bank could charge on May 3, 1979.
>
> * * *
>
> [O]f specific importance here are the charges by the Bank commencing on December 4, 1980 for 208 consecutive days (supra at 14). The Bank admitted full knowledge and intent so to do and collected from Walters $25,000 in interest in excess of 18%.

In this court's slip opinion, the issue concerning the 208 days on which usury was admittedly knowingly charged and collected is addressed as follows:

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*Numbers in brackets are the original typed page numbers.

> The district court also ruled during the course of the trial that as a matter of law any usury claims October 8, 1980, on the personal loan necessarily failed based on the court's construction of certain state and federal interest rate statutes.[5]
>
> * * *
>
> [5]Walters superficially challenges the district court's construction of Pub.L.No.96-221 and Pub.L.No.96-399 in its appellate brief by simply referencing its trial memorandum. We cannot countenance this attempt to circumvent Fed.R.App.P.28(g) and its limitation on appellants' briefs to 50 pages.

Walters did not reference his trial memorandum. Instead, [3] his reference was to a response made to a motion for summary judgment filed by the Bank. The necessity of Walters to refer to his response did not have as its purpose an intent to circumvent the 50 page limit on appellants' briefs. Rather, the necessity was to make it clear that Walters did not concede the motion of the Bank or any contention made in support of the motion.

Walters chose not to explicate, in detail, the error of the district court in its misinterpretation of the governing surcharge law because it was unknown to what extent, if at all, the Bank would argue from or seek to justify the ruling of the district court on this basis. Had the Bank elected, in its brief, to avoid an attempt to justify the judgment below on grounds other than what it purported to be its right under the surcharge statutes, Walters would have been left with his decision to provide this court with no further explanation.

However, the Bank chose, in its brief, to devote 10 pages (Bank brief pp. 33-43) of argument on the surcharge stat-

utes. In order to assist the court in not being misled by the error in interpretation being prulmugated (sic) by the Bank in its brief, Walters was forced to discuss, in detail, the error in the reasoning being suggested by the Bank which, in turn, is the exact same error of the district court used to reduce to insignificance the $25,000 usurious overcharge on 208 consecutive days and subsequent collection of the overcharged interest. Thus, from the first page through the fifth page of the Walters reply brief, Walters explains the import and proper [4] interpretation of the surcharge statutes in a way which would hardly seem subject to categorization as "superficial."

Respectfully, it appears that this court, with a bit of consternation, simply refused to review the district court's misinterpretation of the surcharge statutes on what appears to be a mistaken belief that Walters had not provided this court with sufficient guidance on the subject. Walters pleads with the court to reconsider its apparent refusal to review carefully this matter of pure law based on undisputed facts.

It further appears from this court's slip opinion that court may have failed to understand the full significance of this law question. The 208 days on which the usury was exacted were well within the limitations period established by the district court. Also, the position of Walters concerning the $25,000 in usury exacted on the 208 days presupposes, arguendo only, that the statutes permitting the surcharge were constitutional. It seems necessary to point this out because the slip opinion leaves room to doubt whether the court presumed that the position of Walter (sic) on this point was dependant on the success of Walters' argument concerning the unconstitutionality of the surcharge statutes.

The question of law is: When did the surcharge statutes come effective in Tennessee the Bank's charging more than the otherwise controlling usury ceiling of 18%? The district court quite cordially confessed: "I must confess that I'm still confused about what usury law we are working under." (App. Vol.V. [5] p.1643) It is unquestionable that the surcharge statutes did not become effective in Tennessee on the date when those statutes became effective in most other states. For the purpose of argument only, Walters concedes that there existed a period during which the surcharge statutes were effective in Tennessee.

Without question, the surcharge statutes are perhaps the epitome of inartfulness draftsmanship and, because of this, their interpretation is not easy. Any attempt to rightly divide the surcharge statutes, with respect to their effective dates in Tennessee, without meticulous care and an inordinate amount of study is sure to be truly superficial and unreliable. However, a first blush interpretation, like a hard and meticulous study, is beneficial to Walters because both yield the same conclusion, i.e., that, during the 208 day period in question, the surcharge statutes were not effective in Tennessee; thus, as a matter of law, the Bank could not exact from Walters in excess of the 18% usury ceiling.

It is only that middle range of study of the surcharge statutes, apparently relied on by the Bank during those 208 days, trying to make the statutes justify a predisposition (i.e., that the Bank could charge interest in excess of the 18% usury ceiling) that the interpretation advocated by the Bank begins to appear plausible.

Below, the Bank successfully persuaded the district court that the effective date of the surcharge statutes in Tennessee was October 8, 1980. As a matter of law, the surcharge statutes, [6] on their face, make themselves applicable in Tennessee on, but not before, July 1, 1981. If Walters is correct, a directed verdict in favor of Walters and against the Bank for charging and collecting $25,000 in usury is a foregone conclusion.

ISSUE TWO

The slip opinion is replete with the substantively same statement made over and over. To whit (sic), the following appears at slip opinion 5:

> [W]alters failed to prove that the excess interest charge was knowingly assessed. The only testimony on the issue was from the Bank's witness . . . who admitted . . . overcharges, but who testified that they . . . were inadvertent errors due to manual computer programming oversights. Walters presented no contradictory evidence tending to show that the overcharges were anything but the result of negligence.

continuing at slip opinion 8:

> [W]alters failed to show any evidence of intent, a requisite element of usury.
>
> * * *
>
> [W]alters presented no evidence of intent.

continuing at slip opinion 9:

> [W]alters presented no evidence tending to show that the Bank acted other than negligently or by mistake. As such, there was a complete failure of proof concerning intent, ...

continuing at slip opinion 18:

> The only testimony at trial regarding the Bank's overcharge was that of Mr. Dudley.
>
> * * *
>
> [I]n face of this evidence which at most established negligence on the part of the Bank Walters presented no contradictory * * *
>
> * * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 86-6031

WILLIAM S. WALTERS, JR.,
Plaintiff/Appellant,

V.

FIRST TENNESSEE BANK N.A.
MEMPHIS, et al.,
Defendants/Appellees.

NO. 86-6033

WILLIAM S. WALTERS, JR., Individually and For Himself and Other Shareholders of TEN TEX MARINE, INC., Similarly Situated,
Plaintiffs/Appellants,

V.

FIRST TENNESSEE BANK N.A. MEMPHIS,
DOES 1 THROUGH 99 and
TEN TEX MARINE, INC.,
Defendants/Appellees.

JOINT BRIEF OF APPELLEE
FIRST TENNESSEE BANK N.A. MEMPHIS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION, AT MEMPHIS

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ORAL ARGUMENT REQUESTED

* * *

* * * [33*] *unless* the bank can prove negligence on the part of the customer. It did not involve a statute requiring a finding of "knowledge" or "scienter" on the part of the bank. It involved a statute imposing a standard of strict liability on the financial institution without regard to "knowledge." It is respectfully submitted that the usury statutes are significantly different, in terms of the type of proof required for the imposition of liability on the financial institution, and for that reason the case is clearly distinguishable.

First Tennessee respectfully submits that the trial court was correct in finding that there was absolutely no proof in the record of the intent element necessary to find a violation of the usury statute.

II.

(WALTERS ISSUES NO. II AND III)

THE TRIAL COURT WAS CORRECT IN HOLDING THAT UNDER APPLICABLE LAW, INCLUDING THE SURCHARGE AMENDMENTS TO 12 U.S.C. §§85 AND 86, FIRST TENNESSEE'S CHARGES ON THE $475,000 NOTE WERE PROPER

In Issues II and III raised in the Walters Brief, it is first argued that in executing a promissory note on May 3, 1979, even though that note provided for a floating rate of interest, Mr. Walters was receiving a contractual guarantee [34] that he would never be charged more interest than the maximum rate chargeable on the date of signing. Mr. Walters goes on to argue that federal preemption leg-

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*Numbers in brackets are the original typed page numbers.

islation which granted interest rate relief during and after 1980, if applied to the Walters note, would constitute an unconstitutional impairment of this contract.

First, it should be noted that the interest preemption statutes referenced by Mr. Walters have not been declared unconstitutional by any Court. More importantly, the contract embodied in the $475,000 promissory note obviously anticipated, because of its floating rate of interest, that it might in the future exceed the rate which was the maximum legal rate on the date of signing. This recognition is evidenced by the following language in the note [TR. Ex. 3]:

> The rate of interest on the unpaid principal balances of the indebtedness hereby evidenced shall be adjusted as of each day that the prime rate is changed; provided, always, however, that notwithstanding any changes in said prime rate, the rate of interest hereon prior to maturity shall never be more than the maximum lawful contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge *from time to time.*
>
> . . .
>
> It is the intention of the Maker and the Bank to contract in strict compliance with the usury laws as set forth at 12 U.S.C. §85, and the laws of the State of Tennessee incorporated therein by reference; and, accordingly, in no event and upon no contingency shall [35] the Bank ever be entitled to receive, collect, or apply as interest any interests, fees, other payment equivalent to interest, in excess of the maximum contract rate which may, *from time to time,* be lawfully charged to the Maker hereof *under the applicable law*

> *by a national bank* having its principal place of business in the State of Tennessee . . . . (Emphasis supplied.)

Clearly, the parties contemplated that the maximum rate allowed under the law would fluctuate with time, thus the language "from time to time" throughout the note. If it had been the intention of the parties to simply provide an absolute 18% ceiling, that would have been simple enough to insert; and it is respectfully submitted that the absence of that language, together with the inclusion of the language quoted above, makes the construction urged by Walters illogical.

Mr. Walters raises the issue of whether the trial court correctly ruled that First Tennessee was entitled to the benefit of the preemptive "surcharge" statutes in the case of this note. Mr. Walters, however, did not brief that issue, choosing instead to attempt to incorporate by reference a brief filed with the trial court. First Tennessee's position on this issue, and the position correctly adopted by the trial court, is as follows:

[36] The $475,000 loan was made and the note was signed on May 3, 1979. The usury law on which First Tennessee relied at that time and until December 2, 1980, was the Tennessee usury law. (Tenn. Code Ann. §§47-14-102 & 103). First Tennessee complied with that law.

First Tennessee, as a national bank, was entitled to rely on the Tennessee usury law during the period May 3, 1979 to December 2, 1980 by virtue of 12 U.S.C. §85, which allows a national bank to charge the greater of (i) the rate permitted by state law or (ii) 1% over the Federal Reserve discount rate in effect in the reserve district in which First Tennessee is located.

Tennessee law permitted an interest rate of 5% over the discount rate of the Federal Reserve Bank in Atlanta, with a maximum of 18%. Except for the two inadvertent errors testified to by Mr. Dudley, which did not occur during the period of the Federal Reserve surcharge, during the period when First Tennessee relied on Tennessee law, it *never exceeded the rate permitted by state law.* This fact is not disputed by Walters.

[37] On April 1, 1980, at a time when First Tennessee was relying on state law and the rate charged Walters was within the state law ceiling, Congress adopted Pub. L. No. 96-221.

Pub. L. No. 96-221 [codified at 12 U.S.C. §86(a)] amended 12 U.S.C. § 85 to:

> (a) Preempt any state law, whether statutory or constitutional, to the extent state law imposed a rate ceiling lower than Pub. L. No. 96-221 imposed;
>
> (b) Permit national banks to charge (on loans of the type to Plaintiff) up to "5% in excess of the discount rate, *including any surcharge thereon,* . . . in effect at the Federal Reserve Bank in the Federal Reserve District where the person is located";
>
> (c) Apply only with respect to business . . . loans in amounts of $25,000 or more made in any state during the period beginning on April 1, 1980, and ending on the earlier of -
>
> > (1) April 1, 1983; or
> >
> > (2) [The date such state expressly opts out of the effect of Pub. L. No. 96-221 (which Tennessee never did)]

(d) Provide that where the amendments in paragraphs (a), (b) and (c) above and "any other provision of law . . . apply with respect to the same loan . . . such loan . . . may be made at the highest applicable rate"; and

(e) Repeal as of March 31, 1980, Pub. L. No. 96-104 and parts of Pub. L. No. 96-161 [neither of which were relied on by FTB for Walters' loan].

Pub. L. No. 96-221 by its express terms did not apply to Walters' loan on April 1, 1980 because the loan was not [38] made "during the period beginning April 1, 1980 and ending April 1, 1983." At that time (April 1980), First Tennessee continued to rely on Tennessee law and its rate was within the Tennessee ceiling.

Pub. L. No. 96-221 nonetheless becomes important to this issue because Pub. L. No. 96-399 on October 8, 1980 amended Pub. L. No. 96-221 to *add* a provision that permitted Pub. L. No. 96-221 (with its provision for a surcharge) to apply to Walters' loan by adding to Pub. L. No. 96-221 the following language:

(b) A loan shall be deemed to be made during the period described in subsection (a) [April 1, 1980 to April 1, 1983] if such loan -

* * *

(B) was made *prior to* or on April 1, 1980, and bears or provides for interest during such period on the outstanding amount thereof at a variable or fluctuating rate. (Emphasis added.)

Pub. L. No. 96-399 further provided:

> (2) The amendments made by paragraph (1) [those amendments discussed above] take effect on April 1, 1980.

[39] Pub. L. No. 96-399 thus made Pub. L. No. 96-221 applicable to Walters' loan because that loan was "made prior to April 1, 1980, and [bore] interest during such period on the outstanding amount thereof at a variable or fluctuating rate . . . ."

At the time Pub. L. No. 96-399 was adopted, First Tennessee was continuing to rely on Tennessee law for the rate ceiling. It was not until December 2, 1980 that First Tennessee first relied on federal law for the applicable interest rate ceiling. At that time, Pub. L. No. 96-221 as supplemented by Pub. L. No. 96-399:

> (a) Preempted any state usury law, whether statutory or constitutional, to the extent state law imposed a rate ceiling lower than Pub. L. No. 96-221 imposed.
>
> (b) Permitted national banks to charge (on loans of the type to Plaintiff) up to "5% in excess of the discount rate, *including any surcharge thereon,* . . . in effect at the Federal Reserve bank in the Federal Reserve district where the person is located."
>
> (c) Applied to loans made between April 1, 1980 and April 1, 1983 and to loans made *prior to* April 1, 1980 which provided for interest during such period on the outstanding balance thereof at a variable or fluctuating rate; and
>
> (d) Provided that where the amendments in paragraph (a), (b) and (c) above and "any other pro-

vision of law . . . apply with respect to the same loan . . . such loan may be made at the highest applicable rate." (Emphasis added.)

[40] 12 U.S.C. §86(a), as amended by Pub. L. No. 96-211 and Pub. L. No. 96-399, thus applied to the May 3, 1979 loan. It is on that statute that First Tennessee justifiably relied after December 2, 1980 and consequently, the application of the surcharge to the federal discount rate does not constitute usury.

Walters contends that reliance by First Tennessee on 12 U.S.C. §86(a) was incorrect. Although he does not address the issue in his brief, the trial brief which he attempts to incorporate by reference claims an earlier amendment to 12 U.S.C. §86(a), i.e., Pub. L. No. 96-161, exempted Tennessee from the preemptive federal usury legislation until July 1, 1981. This is an incorrect reading of the statute.

Pub. L. No. 96-161 permitted national banks to charge 5% over the discount rate of the Federal Reserve Bank in the district where the bank is located on business loans in excess of $25,000. It did not provide a surcharge. The amendment was effective from December 28, 1979 and *expired* on the earliest of (1) July 1, 1980 (in states where there was a statutory usury provision); or (2) July 1, 1981 (in states where there was a constitutional usury provision); or (3) the date when the state specifically and by reference rejected the federal usury law. As stated earlier, FTB [41] never relied on this statute, as the loan in question was made prior to its effective date.

It is evidently Walters' position that in states with a constitutional provision regarding usury the federal enactments did not become *effective until* July 1, 1981.

Walters reaches this conclusion on the wording of §213 to Pub. L. No. 96-161, which reads as follows:

> Notwithstanding any other provision of this title, subject to Sections 207(2) and (3) [the opt out provisions], the provisions of *this title* shall continue to apply *until July 1, 1981*, in the case of any state having a constitutional provision regarding maximum interest rates. (Emphasis added.)

It is clear that this provision gives the *expiration* date of the amendment, and not its *effective* date. Only by interpreting the emphasized phrase "this title" in the above quoted portion of §213 to mean all of 12 U.S.C. §85 and 12 U.S.C. §86 does Walters' argument logically proceed to the conclusion urged by him. Apparently, Walters reads §213 to mean that the provisions of 12 U.S.C. §85 (Walters' interpretation of the meaning of "this title") as they existed *prior to* the amendments contained in Pub. L. No. 96-161 would continue in effect until July 1, 1981 in those [42] states having a constitutional provision regarding maximum interest rates. Under Walters' interpretation, the preemptive provisions of Pub. L. No. 96-161 become effective in those states having constitutional usury provisions *beginning* July 1, 1981. This interpretation leads to a curious result in that Pub. L. No. 96-161 *ceases* to be effective in those states having *statutory* usury provisions on July 1, 1980, a full year *before* they would become effective in states having constitutional usury provisions. Obviously such an interpretation makes no sense and must be deemed to be without merit.

Walters' argument on this issue and any refutation of it is unnecessary because First Tennessee never relied on Pub. L. No. 96-161, as that enactment in no way ap-

plied to the Walters loan. The effective date of Pub. L. No. 96-161 was December 28, 1979 and the Walters loan was made on May 3, 1979. There is nothing in Pub. L. No. 96-161, unlike Pub. L. No. 96-221, as amended by Pub. L. No. 96-399, that permits retroactive application. In the absence of applicable federal legislation during that period, First Tennessee continued to operate under state usury law. The proof showed that during the period that First Tennessee was operating under state law, it never exceeded the 18% ceiling [43] (except for the two inadvertent errors testified to by Mr. Dudley and addressed previously in this brief).

The first of the federal usury laws that applied to First Tennessee and to the Walters loan is found in Pub. L. No. 96-221 as amended by Pub. L. No. 96-399, codified at 12 U.S.C. §86(a). By its terms, this enactment, effective April 1, 1980, *repealed Pub. L. No. 96-161,* and preempted any state law, whether statutory or constitutional, that would prohibit the charging of a rate equal to 5% over the discount rate of the Federal Reserve Bank, *including any surcharge.* The amendments found in Pub. L. No. 96-399, enacted October 8, 1980, made that rate applicable to variable rate loans made prior to April 1, 1980. First Tennessee correctly relied on this statute, as amended, because that statute preempted state law, and because it applied to the Walters loan, which was a variable loan made before April 1, 1980. The rates charged Walters from December 2, 1980 to November 16, 1981, although over the 18% usury ceiling of Tennessee, were not usurious because state law had been effectively preempted by the federal statute that allowed the higher rate.

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 86-6031

WILLIAM S. WALTERS, JR.,
Plaintiff/Appellant,

v.

FIRST TENNESSEE BANK, N.A.
MEMPHIS, et al.,
Defendants/Appellees.

Appeal from the United States District Court
for the Western District of Tennessee,
Western Division, at Memphis
United States District Judge Robert M. McRae, Jr.

REPLY BRIEF OF APPELLANT, WILLIAM S. WALTERS, JR.

ORAL ARGUMENT REQUESTED

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Surcharges

On page 5 of the the (sic) Bank brief, the comment is made that Walters did not address the surcharge issue. Walters notes that $25,000 of the interest taken from Walters the Bank justified on no other basis than federal law (Walters Brief p. 32). Walters contended that the $25,000 was taken based on a mistaken interpretation of law (Walters Brief pp. 30-32; 32 n. 15, 34).

The Bank attempts to explain (Bank Brief pp. 33-43) its reasoning in concluding that the surcharge law permitted the $25,000 to be taken. In point of fact, this is simply an explanation of how the bank made the mistakes of law resulting in the $25,000 overcharge.

There are controlling facts which must underlie meaningful analysis of the congressional intent as applied to the May 3, 1979 loan. First, and foremost, there has never been a time when Tennessee has not had an effective **"constitutional provision regarding maximum interest rates."** Tennessee Constitution Article 11, §7. In 1977, Tennessee was one of only 13 states which enjoyed such a provision as a part of its **constitutional law.** *Cumberland Capital Corporation v. Patty,* 556 S.W.2d 516, 519-520 (Tenn. 1977).

Next, at all relevant times, the maximum non-usurious interest chargeable in Tennessee, for loans evidenced by the **"written contract"** was 18%. *T.C.A.* §47-14-103(2). Prior to November 5, 1979 [Arkansas only, *Public Law* 96-104 §301, 93 Stat. 791, 792; *Cong.Rec.* Oct. 29, 1979 p. 29908] and after April 1, 1983, the maximum non-usurious interest chargeable by any national bank (in Tennessee or not) was the maximum allowable non-usurious interest chargeable by state banks. For Walters, this

means that the Bank could charge no [2*] more than 18%.[1] However, the 208-day period of time in dispute here falls after November 5, 1979 and before April 1, 1983. Laying aside the doubts expressed in Congress by the Senate sponsors (Walters brief p. 33 n. 15) concerning the constitutionality of the statute, between November 5, 1979 and April 1, 1983, speaking legislatively only, **some** national banks were legislatively (even if not constitutionally) authorized to charge **some** amount greater than the various state usury ceilings on **some** loans. However, the Walters loan is not a loan on which the Bank, even legislatively, could charge and collect interest greater than the Tennessee usury ceiling of 18%.

Of absolute cardinal importance to this conclusion is remembrance of the fact that, "**during . . . period**" from December 28, 1979 up through and including March 31, 1980, no national bank in Tennessee could charge any borrower interest calculated at a rate greater than 18%. This is true irrespective of whether the loan was negotiated with a variable or a fixed rate of interest.

The statutory language which requires this conclusion reads as follows in Public Law 96-161 - December 28, 1979, 93 Stat. 1240, §213:

> Notwithstanding any other provision of this title, . . . the provisions of this title shall continue to apply until July 1, 1981, in the case of any State having

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*Numbers in brackets are the original typed page numbers.

1. **Evans v. National Bank of Savannah**, 251 U.S. 108 (1919); **Northway Lanes v. Hackley Union National Bank and Trust Company**, 464 F.2d 855 (6th Cir. 1972); **Ray v. American Bank and Trust Company of Chattanooga**, 443 F.Supp. 883 (E.D. Tenn. 1978); **Meredith v. American National Bank of Sparta**, 127 Tenn. 90, 153 S.W. 479 (1912).

> a **constitutional provision regarding maximum interest rates.** (emphasis added)

[3] And Public Law 96-221 - March 31, 1980, 94 Stat. 168, §529:

> Effective at the close of March 31, 1980 . . . amendments made by and the provisions of title II of Public Law 96-161 are hereby repealed, except that the provisions of such Public Law, the provisions of such section, the amendments made by such title, and the provisions of such title shall continue to apply to any loan made . . . in any State **during any period** when those provisions or amendments were in effect in such State. (emphasis added)

Title II, §205 of Public Law 96-161 - December 28, 1979, 93 Stat. 1237-1238 purported to change the relationship between state usury laws and federal usury laws by allowing national banks to charge 5 percentage points over the Federal Reserve discount rate even if the result was a rate which exceeded the usury ceiling in the state. Before this statute, 12 *U.S.C.* §85 permitted a 5 point additur if so doing did not exceed the state usury ceiling. This statute remained in effect, without modification, through March 31, 1980, because Title II of Public Law 96-161 - December 28, 1979, §13, 93 Stat. 1240, Public Law 96-161 was effective to affirmatively maintain the Tennessee usury ceiling of 18% in Tennessee until July 1, 1981.

Therefore, any borrower who made a variable rate loan from a national bank in Tennessee between December 28, 1979 and April 1, 1980 would rightly expect that the Tennessee usury law placed an 18% cap on

the variance of his/its varying interest rate up through and including June 30, 1981.

Public Law 96-221 - March 31, 1980, §511(a), 94 Stat. 164, enacted a statute which permitted national **banks, allowed by** Public Law **96-161** to charge 5% over the Federal Reserve discount rate, irrespective of whether that rate exceeded the state's usury ceiling, to charge, **in addition, a surcharge** announced by the Federal Reserve [4] Bank. This statute had absolutely no application to **banks, like First Tennessee, not allowed by** Public Law **96-161** to charge more than the state's usury ceiling. Public Law 96-221 - March 31, 1980, §**512,** 94 Stat. 164 explicitly provided that the surcharge would be applied **only** to **loans** made **on or after April 1,** 1980. Section 529 of Public Law 96-221, quoted above, explicitly re-affirmed the provisions of Public Law 161 affirmatively exempting loans made in Tennessee up through and including June 30, 1981.

Public Law 96-221 remained continuously in effect, without modification, through October 8, 1980. Significantly, Congress amended a small portion of Public Law 96-221 on October 8, 1980. It is very important to note that Public Law 96-221 remained in full force and effect after October 8, 1980 except, and only, to the extent modified on October 8, 1980. The amendment reads, in pertinent part, as follows in Public Law 96-399 - October 8, 1980, 94 Stat. 1648:

> (c) (1) Section 512 of such Act is amended — (A) by inserting '(a)' after 'Sec. 512.'; and (B) by adding at the end thereof the following: '(b) A loan shall be deemed to be made **during the period** described in subsection (a) if such loan — . . . '(b) was made prior to or on April 1, 1980, and bears or provides for in-

terest **during such period** on the outstanding amount thereof at a variable or fluctuating rate; . . . (emphasis added)

It is **quite important** to note that nothing in Public Law 96-399 - October 8, 1980 in any way disturbs, modifies, repeals or changes any part of Public Law 96-221 §529 - March 31, 1980, 94 Stat. 168, which explicitly reaffirmed the provisions of Public Law 96-161 - December 28, 1979, 93 Stat. 1240 exempting loans made by national banks in Tennessee from the provisions of both Public Law 96-162 §205, 93 Stat. 1237 [5] - 1238 and Public Law 96-221, §511(a) until July 1, 1981.

What the October 8, 1980 amendment did was make all of what had been §**512** of Public Law 96-221 subsection (a) of the amended §**512.** The language of the October 8, 1980 amendment, which is of critical significance to the instant question, is **"during the period"** and **"during such period."** Read in context with the unamended §**512,** it is clear that the period is between December 28, 1979 and April 1, 1980. There is no mention of loans, like Walters' May 1979 loan, made prior to December 28, 1979. When enacted, §512 legislatively, but not constitutionally, allowed loans affected by *Public Law* 96-161, i.e., those made after December 28, 1979, to be treated the same as loans made on or after April 1, 1980. However, loans made before December 28, 1979 were not affected by 96-161 in the first place.

Undercharge Theory

It is argued (Bank Brief pp. 23-32), based on the fragile assertion that, because the Bank lawfully could have charged and collected from Walters more interest

than it did charge and collect during certain interims between variances in the rate, the fact that there were other interims between the variances of the rate when it charged and collected more than it could lawfully charge and collect, it should be excused from the overcharging. To fully understand this argument, something about the mechanics of what occurred should be noted. Because the rate charged Walters was a variable rate, the rate changed from time to time. On hypothetical date "A", the rate would be fixed at a certain percentage. On some subsequent date, from one day thereafter on the rate fixed on date "A" remained in force. However, on some future date, the rate would change to a higher or lower rate. The amount of time between date "A" and the date thereafter on * * *.

* * *

* * * [23] society attaches to usury is not an antiquated societal attitude. *Szerdahelyi v. Harris*, 499 N.Y.S. 2d 650, 67 N.Y.2d 40 (Ct.App. 1986).

Evidence Of Knowledge

Much is devoted (Bank's Brief pp. 6, 7, 12-14, 16-17, 19, 21-22, 31-33) trying to persuade that there was nothing more than an inadvertent clerical error, without knowledge, which produced the overcharge. There seems to be no difference between Walters and the Bank over the proposition that a "mistaken computation" or a "scrivener's mistake" (Bank's Brief p. 21) are considered to be inconsistent with what is required for an overcharge to be knowingly made. The difference is over what constitutes a "mistake in computation" or a "scrivener's mistake" for the purpose of getting a free pass under the usury laws for an overcharge. Where First Tennessee

goes awry is that it considers anything classifiable as an "honest error" or any incorrect computation of interest, no matter what the cause, or anything which one might consider an "oversight" or any other inadvertency capable of excusing an interest overcharge. Apparently, First Tennessee considers more than mere knowledge to be required; instead, an "illegal or improper intent" is asserted as the necessary state of mind (Bank's Brief p. 21). This simply is not the law. Inadvertently selecting the wrong chart from which to compute interest and, because of this inadvertency, erroneously computing an inflated amount is not an excusable "mistake in computation" or a "scrivener's mistake" (Walters Brief p. 21).

First Tennessee says of itself that it made an "admission of inadvertent errors" (Bank's Brief p. 21). It is suggested that what First Tennessee has admitted, as was quite obvious to the jury, are facts which lead to the ines- [24] capable conclusion that the Bank acted with all the knowledge required by the federal usury statute. One need not quibble about whether what was admitted were "inadvertent errors" or pre-planned actions.

The affidavit of the Bank's representative, which was the subject of the questioning appearing in the Bank's Brief at pp. 12 and 13, reveals 14 separate references by the Bank's representative that the problem resulting in the overcharges involved the computer (September 20, 1983 Dudley Aff. pp. 5, 6, 7, 8, 9, 10, 11, 12, 15, 17, 19). Of the 14 references to the computer, 12 of those uses refer to the computer not being properly provided information in a timely fashion by the Bank employees. Throughout the affidavit, Mr. Dudley repeatedly blames the unknown "appropriate clerk" as the culprit who did not do what was supposed to be done. By the affidavit,

Mr. Dudley attempts to lay blame on the fact that the computer had to be manually controlled and refers to the fact that the computer in use was designed to meet the needs of the Bank a time when "there was no need to fully automate this updating process" (Dudley Aff. p. 7).

In the October 28, 1983 deposition of Mr. Dudley, which was read to the jury as evidence, he admitted, quite candidly, that the problem which caused the overcharges was the fact that the Bank was under staffed and the Bank computer was not sufficiently updated to handle the information which it was required to handle in order for accuracy to be assured (October 28, 1983 Dudley Dep. pp. 33-35; 36-39; 42-43; 44, 45). The Bank **had the knowledge** necessary to accurately compute the interest, but the staffing and systems left the Bank **unable to process the knowledge it had** efficiently enough to avoid the overcharges. Mr. Dudley candidly admitted, in his deposition at 45:

> **If I had the time** to review all those notes and go back and figure out again which notes had what, what changes should have occurred. And then also, Larry, I'm sure several times that before I got my new note listing, the ceiling had changed one or more time (sic), and sometimes it would change more than once a week. Sometimes I think it would change daily. You know, multiple happenings would occur. It **virtually made it impossible** from a time standpoint to go back and do that. (emphasis added)

Finally, Mr. Dudley candidly stated as follows in his deposition at 44:

> Larry, what I'm saying is I don't know why or how the undercharges and overcharges occurred.

* * *

Q. [44-46] Okay. So we are back down to what you said a minute ago. You **just don't know** who made the mistake, where or how it was made except that you don't think you made it?

A. **That is correct.** That is correct.

The Bank is arguing that Walters and other borrowers from the Bank should bear the risk of the Bank's inadequate systems and its failure to staff itself to meet the known need to process the information (knowledge) it had.

PARRISH & MULROONEY, P.C.
By: /s/ Larry E. Parrish
Larry E. Parrish
Brinkley Plaza
80 Monroe, Suite 410
Memphis, Tennessee 38103
(901) 526-7777

PROMISSORY NOTE

$475,000.00 Memphis, Tennessee
May 3, 1979

FOR VALUE RECEIVED, the undersigned, WILLIAM S. WALTERS, JR., ("Maker") promises to pay to the order of FIRST TENNESSEE BANK N.A. MEMPHIS, Memphis, Tennessee ("Bank"), the principal sum of FOUR HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($475,000.00), together with interest from date until maturity, upon unpaid principal balances, at the rate hereinafter specified, each unpaid installment of principal or interest to bear interest after maturity (whether by acceleration or otherwise) at the maximum contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge from time to time.

Subject to the limitations hereinafter set forth, the unpaid principal balance of the indebtedness hereby evidenced shall bear interest per annum which is one hundred thirty percent (130%) of the Bank's prime rate, as in effect from time to time. The rate of interest on the unpaid principal balances of the indebtedness hereby evidenced shall be adjusted as of each day that the prime rate is changed; provided, always, however, that notwithstanding any changes in said prime rate, the rate of interest hereon prior to maturity shall never be more than the maximum lawful contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge from time to time. The term "prime rate" shall be deemed to mean that rate of interest per annum charged by the Bank on 90

day borrowings by corporate borrowers with the highest credit standing for commercial loans, such "prime rate" being, as of the date hereof, eleven and 3/4 percent (11.75%) per annum. Said principal shall be payable in twenty-eight (28) consecutive calendar quarterly installments of principal, on the 25th day of each March, June, September and December, commencing March 25, 1980, installments one (1) through twenty-seven (27), both inclusive, to be in the principal sum of $16,964.00 and installment no. twenty-eight (28) in the principal sum of $16,972.00. Said interest upon unpaid principal balances, computed as above provided, shall be payable calendar quarterly on the 25th day of each March, June, September and December commencing June 25th, 1979, subject to the terms hereafter set forth for certain prepayment.

All installments of interest and principal hereof, are payable at the offices of First Tennessee Bank N.A. Memphis, 165 Madison Avenue, Memphis, Tennessee, 38103, or at such other place as the holder may designate in writing, in lawful money of the United States of America, which shall be legal tender in payment of all debts and dues, public and private, at the time of payment.

This note is secured by certain security agreements, pledges and assignments, all of even date herewith, briefly described as follows:

(a) A security interest in all of the capital stock owned by Maker in Ten Tex Aggregate & Coal Co., Inc. evidenced by the stock certificates.

(b) Pledge of that certain promissory note of even date executed by Ten Tex Aggregate & Coal Co.,

Inc. as maker in the principal amount of $350,000.00, together with interest as provided in said promissory note and payable to the order of Maker.

(c) Assignment of that certain Agreement for Redemption of Capital Stock and Covenant Not to Compete ("Agreement") made and entered into the 20th day of December, 1976, executed by Fischer Lime & Cement Company, Inc. as Maker and in the principal sum of $1,378,500.00, together with interest as provided in said Agreement and payable to the order of Maker.

If the Maker shall fail to make payment of any installment of principal or interest within three (3) days of the date such installment is due, as above provided, or upon any default in any of the terms and provisions of any security agreement, trust deed, mortgage, assignment, or other instrument of pledge or hypothecation which now or hereafter secures the payment of the indebtedness evidenced hereby, then and in any such event, the entire unpaid principal balance of the indebtedness evidenced hereby, together with all interest then accrued, shall, at the option of the holder of this note, at once become due and payable without demand or notice, the same being expressly waived.

If this note is placed in the hands of an attorney for collection, by suit or otherwise, or to protect the security for its payment, or to enforce its collection, the Maker will pay all costs of collection and litigation, together with a reasonable attorney's fee.

The Maker and any endorsers or guarantors hereof waive, protest, demand, presentment and notice of dishonor, and agree that this note may be extended, in

whole or in part, without limit as to the number of such extensions, or to the period or periods thereof, without notice to them and without affecting their liability thereon.

Upon at least three (3) business days' written notice to the Bank the Maker may, at its option, prepay the Note in whole at any time or prepay in part at any time and from time to time without premium or penalty, but with accrued interest to the date of such prepayment on the amount prepaid, provided that any partial prepayment shall be applied to the principal balance of the indebtedness then outstanding in the inverse order of principal installment maturities.

It is the intention of the Maker and the Bank to contract in strict compliance with the usury laws as set forth at 12 U.S.C. §85, and the laws of the State of Tennessee incorporated therein by reference; and, accordingly, in no event and upon no contingency shall the Bank shall ever be entitled to receive, collect, or apply as interest any interests, fees, or other payment equivalent to interest, in excess of the maximum contract rate which may from time to time be lawfully charged to the Maker hereof under the applicable law by a national bank having its principal place of business in the State of Tennessee; and, in the event that the Bank ever receives, collects, or applies as interest, any such excess, such amount which would be excessive interest shall be applied to the reduction of the principal amount of the indebtedness hereby evidenced; and, if the principal amount of the indebtedness evidenced hereby, and all interest thereon is paid in full, any remaining excess shall be forthwith be paid to the Maker hereof, or other

party lawfully entitled thereto. In determining whether or not the interest paid or payable, under any specific contingency, exceeds the highest lawful contract rate, the Maker hereof and the Bank shall, to the maximum extent permitted under applicable law, characterize any non-principal payment as an expense, fee, or premium, rather than as interest. Any provision hereof, or of any other agreement between the Maker and the Bank, that operates to bind, obligate, or compel the Maker to pay interest in excess of such maximum lawful contract rate, (permitted from time to time to be charged by national bank having its principal place of business in the State of Tennessee) shall be construed to require the payment of the maximum rate only. The provisions of this paragraph shall be given precedence over any other provision contained herein or in any other agreement between the Bank and the Maker hereof that is in conflict with the provisions of this paragraph.

/s/ William S. Walters, Jr.
WILLIAM S. WALTERS, JR.

P.O. Box 402022
Dallas, Tx. 75240

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The United States Constitution, Article 1 §10, in pertinent part, provides:

> No state shall . . . pass any . . . law impairing the obligation of contracts, ...

2. The Constitution of Tennessee, Article 1 §20, in pertinent part, provides:

> That no retrospective law, or law impairing the obligations of contracts, shall be made.

3. The United States Constitution, Amendment 5, in pertinent part, provides:

> No person shall be . . . deprived of . . . property, without due process of law. . . .

4. The Constitution of Tennessee Article 11 §7, in pertinent part, provides:

> The General Assembly shall define and regulate interest, and set maximum effective rates thereof.

5. Tennessee Code Annotated §47-14-103(2) (1979) provides:

> For all written contracts . . . rate . . . in no event shall exceed eighteen percent (18%) per annum. . . .

6. In pertinent part, 12 U.S.C. §85 provides:

> Any association [national bank] may take, . . . and charge on any loan . . . interest at the rate allowed by the laws of the State, . . . where the bank is located. . . .

7. In pertinent part, 12 U.S.C. §86 provides:

> The taking, . . ., or charging a rate of interest greater than is allowed by the preceding section [12 U.S.C. §85], when *knowingly* done, shall be deemed a forfeiture of the entire interest. . . . (emphasis added)

8. In pertinent part, 12 U.S.C. §86a provides:

> (a). If the applicable rate prescribed in this section exceeds the rate a person would be permitted to charge in the absence of this section, such person may in the case of a business . . . loan in the amount of $1,000 or more, notwithstanding *any State constitution or statute* which *is hereby preempted* for the purposes of this section, take, . . . and charge on any such loan, interest at a rate of not more than 5 per centum in excess of the discount rate, including any surcharge thereon, on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the person is located. (emphasis added)
>
> * * *
>
> (c). If the rate . . . in subsection (a) exceeds the rate such person would be permitted to charge in the absence of this section, and *such State imposed rate is thereby preempted* by the described in subsection (a), the taking, . . ., or charging a greater rate than is allowed by subsection (a), when *knowingly* done, shall be deemed a forfeiture of the entire interest. . . . (emphasis added) (same as Public Law 96-161, December 28, 1979, 93 Stat. 1237-1238 §205)

9. In pertinent part, Public Law 96-161, December 28, 1979, 93 Stat. 1240 §213 provides:

> Notwithstanding any other provision of this title [i.e., including §205, in pertinent part, quoted immediately above] . . ., the provisions of this title shall continue to apply until July 1, 1981, in the case of any State having a constitutional provision regarding maximum interest rates.

10. In pertinent part, Public Law 96-221, March 31, 1980, 94 Stat. 164 §512 provides:

> The provisions of this part shall apply only with respect to business . . . loans . . . made in any State *during the period* beginning on April 1, 1980, and ending on . . . April 1, 1983; . . . [e]xcept that such provisions shall apply to any loan made on or after . . . [April 1, 1983] pursuant to a commitment to make such loan which was entered into on or after April 1, 1980 and prior to . . . [April 1, 1983].

11. In pertinent part, Public Law 96-221, March 31, 1980, 94 Stat. 168 §529 provides:

> Effective at the close of March 31, 1980, . . . the amendments made by the provisions of title II of Public Law 96-161 (i.e., §512 quoted immediately above) are hereby repealed, except that the . . . amendments made by such title (i.e., §512 quoted immediately above) . . . shall continue to apply to any loan made . . . in any State *during any period* when those . . . amendments were in effect in such State. (emphasis added)

12. In pertinent part, Public Law 96-399, October 8, 1980, 94 Stat. 1648 §512 provides:

> (c)(1) Section 512 of such Act is amended - (A) by inserting '(a)' after 'Sec. 512.'; and (B) by adding at the end thereof the following: '(b) a loan shall be deemed to be made *during the period* described in subsection (a) if such loan - '(1)(A) is funded or made in whole or in part *during such period,* regardless of whether pursuant to a commitment or other agreement therefor made prior to April 1, 1980;' '(C) was made prior to or on April 1, 1980, and bears or provides for interest *during such period* on the outstanding amount thereof at a variable or fluctuating rate; . . . . (emphasis added)

13. In pertinent part, 18 U.S.C. §1341 (1976) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . [f]or the purpose of executing such scheme or artifice or attempting so to do, places in any . . . authorized depository for mail matter, any matter . . . or knowingly causes to be delivered by mail . . . [a]ny such matter . . . shall be fined . . . or imprisoned. . . .

14. In pertinent part, 18 U.S.C. §1961 provides:

> As used in this chapter [18 U.S.C. §§1961 et seq.] (1) 'racketeering activity' means . . . (B) any act which is indictable under any of the fol-

lowing provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), ...

* * *

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, ;. . . .

15. In pertinent part, 18 U.S.C. §1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated . . . to use . . ., directly or indirectly, any part of such income, or the proceeds of such income, in . . . the . . . operation of, any enterprise . . . .

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

Previously
(No. 82-2391-H)

WILLIAM S. WALTERS, JR.,
Plaintiff,

v.

FIRST TENNESSEE BANK, N.A. MEMPHIS and
DOES 1 THROUGH 99,
Defendants,

AND

Previously
(No. 82-2783-H)

FISCHER LIME AND CEMENT CO., INC.,
Plaintiff,

v.

WILLIAM S. WALTERS, JR. and FIRST TENNESSEE
BANK, N.A. MEMPHIS,
Defendants,

AND

---

*No. 82-2869-M
Consolidated

WILLIAM S. WALTERS, JR. AND OTHER SHAREHOLDERS OF TEN TEX MARINE, INC., SIMILARLY SITUATED,
Plaintiffs,

v.

FIRST TENNESSEE BANK, N.A. MEMPHIS and DOES 1 THROUGH 99,
Defendants.

RESPONSE OF WALTERS TO FIRST TENNESSEE MOTION TO DISPOSE OF PENDING MOTION FOR SUMMARY JUDGMENT, AND TO APPLY COLLATERAL ESTOPPEL TO USURY ISSUES IN CAUSE NOS. 82-2391-H AND 82-2783-H

Background

[6*] After First Tennessee filed the above-referred to "Response To Motion For Summary Judgment And Motion For Summary Judgment Filed On Behalf Of First Tennessee Bank, N.A. Memphis" and the attached Affidavit of Charles B. Dudley, III in the Fischer interpleader case, Walters noticed an oral deposition of Charles B. Dudley, III which was taken on October 28, 1983 and which is presently on file, as of November 7, 1983, in the Fischer interpleader case. Additionally, on November 15, 1983, Walters filed in that case a document titled "Substituted Reply Of Walters To The Response Of First

*Numbers in brackets are the original typed page numbers.

Tennessee To The Motion For Summary Judgment Of Walters And Response Of Walters To The Motion For Summary Judgment Of First Tennessee" (hereinafter "Substituted Reply").

Almost the exclusive subject addressed by questioning in the October 28, 1983 deposition of Charles B. Dudley, III was the Affidavit which he had executed on September 20, 1983 and which had been filed in support of the Motion For Summary Judgment By First Tennessee. The net result of the sworn deposition testimony of Charles B. Dudley, III given by deposition on October 28, 1983 is that he does not now, nor ever has had, any direct knowledge concerning clerical error (whether of the excusing type or otherwise) because of computer problems and that he knows of no person who has any such direct knowledge.

This is illustrated by the following quotations from Mr. Dudley's October 28, 1983 deposition at p. 44:

[7]

A. Larry, what I'm saying is I don't know why or how the undercharges and overcharges occurred.

Q. Okay.

A. We had had a manual system set up, and I don't know how the three undercharges nor the two overcharges occurred.

And again at pp. 45-46:

Q. Okay. So we are back down to what you said a minute ago. You just don't know who made the mistake, where or how it was made except that you don't think you made it?

A. That is correct. That is correct.

Q. Okay. Based on your memory in September, 1983?

A. That's correct.

Mr. Dudley admitted that he had no firsthand knowledge about who made what mistakes or when (except that his memory, unaided by any records, indicated to him that he had made no mistakes) so that the mistake making about which he made oath had to have been made by someone who had not admitted the mistake to him. As to the source of the information which Mr. Dudley included in his Affidavit but as to which he did not have firsthand knowledge, Mr. Dudley had only five sources: Mr. Bearman, counsel of record here; Mr. Welch, in-house counsel for First Tennessee; Mr. Williams, another employee of First Tennessee formerly in-charge of the Loan and Discount Department; Frank Bloom, a First Tennessee loan administrator and account officer (see deposition on file in prime rate case); and Ms. Callian, a clerical employee of First Tennessee * * *.

* * *

* * * [13] Reserve discount rate as the reference to which five percentage points were to be added. Instead, as is stated in Mr. Dudley's Affidavit at page 12:

> However, in setting the interest rate for this period, First Tennessee Bank, N.A. Memphis applied the Atlanta Federal Reserve discount rate which did not drop until June 16, 1980
>
> * * *
>
> First Tennessee Bank, N.A. Memphis is entitled to use the Atlanta Federal Reserve Rate according to

opinion of counsel since a majority of the State of Tennessee is governed by the Atlanta Federal Reserve. (emphasis added)

Mr. Dudley addressed this subject in his sworn testimony by deposition on October 28, 1983 as follows on pp. 68-71:

Q. Do you know on what basis you claimed in your affidavit that the bank could reference the Atlanta Federal Reserve rate as opposed to the St. Louis Federal Reserve rate to determine what the discount rate was on a given day?

A. Do I know what—

Q. What gave you the right to refer to St. Louis on some days and Atlanta on other days or did you have your option all the time, because you give that as one of the reasons why Coopers & Lybrand was wrong on one occasion?

A. There again, that was not part of my function, but as stated in the affidavit under *"Opinion of Counsel,"* we could us the Atlanta . . . discount rate due to the fact that . . . Tennessee is governed by both the St. Louis Fed and the Atlanta Fed, . . .

Q. Okay. Did *opinion of counsel* give you that option on any given day?

[14]

* * *

Q. . . . *this opinion of counsel* that says on X month of X year and X day you can use Atlanta but every day before and after you have to use St. Louis?

A. I don't have *the opinion*. I don't know the specific wording of *the opinion* other than as it applies to the particular instance in this affidavit.

Q. Okay. When you were going back to review the information necessary for you to give the affidavit, did you consider yourself *because of opinion of counsel* to be able to select between the St. Louis and the Atlanta rate to determine whether there had been an overcharge or an undercharge on any given day?

* * *

A. Yes.

Q. So that option was constantly available to you on the days that were in question or that you referred to in your affidavit?

A. We were able to use the Atlanta rate.

Q. Could you also use the St. Louis rate? I mean, were you restricted to one or the other or did you have the option to choose between?

A. Larry, I don't know that.

Q. Okay. . . .

A. The usury ceiling was set. There again, I don't set the usury ceiling. When we went back to check the usury ceiling that we used, we looked on that date and there was a difference in the St. Louis rate and the Atlanta rate, and when we checked on—when I checked on why we used the Atlanta rate, it was because we had *an* [15] *opinion, a former opinion, of counsel* that we could use the Atlanta rate.

If the legal opinion of the First Tennessee counsel is in error, and First Tennessee was required by law to use the St. Louis Federal Reserve discount rate, the fact that First Tennessee interpreted the law to mean that it could reference the Atlanta Federal Reserve discount rate is of no protection to it in leveling the overcharges. The law requires First Tennessee to bear 100% of the risk of rightly interpreting the law. No matter how much good faith First Tennessee had in its mistake of law, the law requires First Tennessee to bear the result of what the law declares to be an intentional act on the part of First Tennessee.

Mr. Dudley is not an attorney, and his Affidavit statement that counsel issued a legal opinion allowing the Atlanta Federal Reserve to be the reference in no way validates the interpretation of law by First Tennessee counsel. Thus, Mr. Dudley's Affidavit, as it concerns the overcharges on June 13, 1980 through June 15, 1980, offers no proof that the overcharges, when compared with the St. Louis Federal Reserve discount rate, are excusable as mistakes recognizable by law as sufficient to exonerate First Tennessee because of an unintentional overcharge.

On the face of Mr. Dudley's Affidavit, there is evidence that what the law requires as to which one of the Federal Reserve Banks must be referenced in order to determine the * * *.

* * *

* * * [32] lending market. Also, it is notable that Mr. Dudley testified that handwritten records were made by him at the time which, if available now, could be referenced to determine whether or not Mr. Dudley conveyed incorrect information concerning interest rate changes. But, those records have been destroyed in the

normal course prior to the commencement of the instant lawsuits.

Even though it requires a substantial amount of quotation, what Mr. Dudley made oath to in his deposition is so significant that the issue before the court could hardly be resolved without considering the testimony. Therefore, to simplify cases, the following is excerted from Mr. Dudley's October 28, 1983 deposition at pp. 33-35:

Q. So anything you say about what happened in loan and discount once you conveyed your note listing with the information on it is something that you know because somebody else told you what was going on at that point?

A. That is correct.

Q. . . . once loan and discount did whatever it did to execute, were you given anything back from loan and discount that advised you what they had done?

A. No.

* * *

A. . . . Our computer system was not set up to do that. During this time frame, we **realized** that the amount of changes that were going to have to be made on a daily and weekly basis to all the thousands of notes we had was becoming massive and **we would have to automate** this system [33] and we would also have to have the reports that came out to show checks and balances.

At that point we were strictly on a manual system and **we never faced anything like this before**, so at that point Clay Williams or whoever initi-

ated rewriting . . . our programs so that at some point if the usury ceiling changed for a particular type of transaction, that information could be entered into the computer once and then every note would automatically be changed and the proper reports would come out. That took time and was not done during this time frame.

Q. Okay. This time frame being 1980?

A. I'm not sure when it actually came about.

See also pp. 36-39:

Q. All right. Now, did you ever receive back from loan and discount the loan listing where you made your handrwitten notations beside the various loans?

A. No. The clerks **threw them away** every day.

* * *

Q. Okay. And so how would you know, if you knew, what interest rate was being charged after the point that you gave your loan listing with the handwritten information to loan and discount?

A. Subsequently we would get new note listings. I don't remember, Larry whether it was a weekly or a monthly basis. We would get new note listings that would list the note and the interest rate that was on the note at that time.

Q. Your new note listing, would it come from L and D?

A. Yes.

Q. Okay. So, in effect, L and D would be reporting back to you what they had done with the information which you had previously given to them by that new note listing?

A. Yes, but not immediately.

Q. And the new note listing which you received immediately after—not immediately time-wise, but in sequence-wise—after you had given the previous note listing with your handwritten information on it should reflect what you had written on there?

A. That is correct.

Q. When you got your new note listing, as a matter of your own procedure did you go back and double check what was reported back from L and D to see if it coincided with what you had written on the loan listing that you had given them before?

A. Larry, **that was not a normal procedure** in that what we were given to understand was that everything that we were sending over there was being implemented, and I'll reiterate again that a loan officer is not at his desk every day, he is out of town, and then **there is a huge volume of transactions going through.** You periodically review your note listing to see if everything looked in order to you, but it was not done on a regular basis by the account officer.

Q. It would seem just realistically based on the work load that you had and from what you

described here today that you would for the most part trust that the information that you had given L and D had been put in in the way that you had gave it to them and what you got back in the new loan listing was the same?

A. That is correct.

[35]

Q. And, actually, unless you had kept a copy of what you delivered to L and D, you wouldn't have anything to check it against anyway, would you?

A. That is correct.

* * *

Q. And if you had a very long list of loans, that could be a prodigious task, wouldn't it?

A. It would be very difficult to do.

See also pp. 42-43:

Q. Okay. During this time period—and by that, I mean the time period when you were making these handwritten notations on your loan listing concerning Mr. Walters' note—do you have some idea of approximately how many loans you were responsible for at that time? I mean, are we talking ten, twenty, a hundred and twenty? Just ballpark.

A. Larry, I'm going to have to guess to me a hundred.

* * *

A. A hundred notes on the note listing and several customers would have multiple notes. There are

not necessarily a hundred customers, but a hundred notes.

Q. I understand.

A. It was a significant number.

Q. Within a variance of fifty either side of a hundred?

A. Right.

See also p. 45:

Q. . . . When you got the new loan listing which was generated after you made * * *.

Supreme Court, U.S.
FILED
FEB 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-1185

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM S. WALTERS, JR.,
Petitioner,

vs.

FIRST TENNESSEE BANK
N.A. MEMPHIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED FOR REVIEW

Respondent does not agree with the Petitioner's statement of the questions presented, and submits that this Petition requires the Court's consideration of the following questions:

1. Whether Petitioner may raise issues before this Court by Petition for Writ of Certiorari, filed more than 90 days after entry of the judgment of the United States Court of Appeals for the Sixth Circuit, where a Petition to Rehear was filed with regard to only one of three cases consolidated for trial, but where belated review is sought of issues involved in the two cases which were not the subject of a Petition to Rehear.

2. If Question No. 1 is answered in the affirmative, whether the constitutionality of Pub. L. No. 96-221 and Pub. L. No. 96-399 (codified at 12 U.S.C. §86a), as amended, is a proper subject for review by this Court when challenged as giving rise to an unlawful impairment of contract, where the statutes have expired and the contract itself incorporated by reference applicable usury laws as they may exist "from time to time".

3. If Question No. 1 is answered in the affirmative, whether the United States Court of Appeals for the Sixth Circuit was correct in ruling that there is no violation of 12 U.S.C. §86 where no evidence exists in the record to support a finding that excess interest was "knowingly" charged to a borrower.

4. If Question No. 1 is answered in the affirmative, whether the Courts below were correct in holding that there was no evidence in the record in this case to support a finding of usury.

5. Whether the United States Court of Appeals for the Sixth Circuit was correct in holding that there is no violation of the federal mail fraud statute, 18 U.S.C. §1341, absent any proof of fraud or deception.

DISCLOSURE OF CORPORATE AFFILIATIONS PURSUANT TO SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Respondent, First Tennessee Bank National Association (formerly First Tennessee Bank N.A. Memphis) states that it is a wholly owned subsidiary of a publicly owned corporation, First Tennessee National Corporation and that First Tennessee National Corporation is the only publicly owned corporation not a party to this proceeding that has a financial interest in the outcome.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
TABLE OF CONTENTS IV
TABLE OF AUTHORITIES V
OPINIONS BELOW 1
CONSTITUTIONAL PROVISIONS AND STATUTES 2
COUNTER-STATEMENT OF THE CASE 3
SUMMARY OF ARGUMENT 9
ARGUMENT—
The Petition for Writ of Certiorari is not timely and the Court has no jurisdiction to review the usury issues described in the Petition 10
The trial court and the Court of Appeals were correct in holding that under applicable law, including the surcharge amendments to 12 U.S.C. §85 and §86, Respondent's charges on the $475,000 note were proper 11
The trial court and the Court of Appeals were correct in holding that there is no evidence in the Record to support Petitioner's claim of usury 21
Petitioner failed to prove the elements of a violation of the mail fraud statute (18 U.S.C. §1341) 25
CONCLUSION 28
APPENDIX—
Pertinent statutes not reproduced by Petitioner A1

TABLE OF AUTHORITIES

Cases:

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) 12

Bender v. Southland Corp., 749 F.2d 1205 (6th Cir. 1984) 26, 27

Citizens' Bank v. Opperman, 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919) 11

Department of Banking v. Pink, 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942) 11

District of Columbia v. Sweeney, 310 U.S. 631, 60 S.Ct. 1082, 84 L.Ed. 1402 (1940) 12

Epstein v. United States, 174 F.2d 754 (6th Cir. 1949) 26, 27

Ford Motor Credit Corp. v. Catalani, 238 Ark. 561, 383 S.W.2d 99 (1964) 23

Maestro Music, Inc. v. Rudolph Wurlitizer Co., 354 P.2d 266 (Ariz. 1960) 24

Matton Steamboat Co., Inc. v. Murphy, 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943) 11

Murphy Finance Co. v. Fredricks, 127 N.W.2d 924 (Neb. 1964) 24

Mutual Protective Corp. v. Palatnick, 118 Conn. 1, 169 A. 917 (1934) 24

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951) 25

Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954) 27

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 12

Schacht v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970) 11

Sumner v. Investment Mortgage Company of Florida, 332 So.2d 103 (Fla. App. 1976) 24
United States v. Schilling, 561 F.2d 659 (6th Cir. 1977) 27
United States v. Talbott, 590 F.2d 192 (6th Cir. 1978) 27
United States v. Van Dyke, 605 F.2d 220 (6th Cir.), *cert. denied*, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979) 27
Walters v. First Tennessee Bank N.A. Memphis, 855 F.2d 267 (6th Cir. 1988) 1
Wheeler v. Union National Bank of Pittsburgh, 96 U.S. 268, 24 L.Ed. 833 (1878) 24
White v. Kaminsky, 196 Tenn. 180, 264 S.W.2d 813 (1954) 23-24
Windsor v. United States, 384 F.2d 535 (9th Cir. 1967) 26

Statutes:

12 U.S.C. §85 ..... 13, 15, 19
12 U.S.C. §86 ..... 19, 21, 24
12 U.S.C. §86a 15, 18, 20
18 U.S.C. §1341 ..... 3, 8, 25, 27
18 U.S.C. §1961 ..... 4, 16
28 U.S.C. §2101(c) 11
Pub. L. No. 96-104 16
Pub. L. No. 96-161 ..... 16, 18, 19, 20
Pub. L. No. 96-211 18
Pub. L. No. 96-221 ..... 14, 15, 16, 17, 20
Pub. L. No. 96-399 ..... 14, 16, 17, 20
Tenn. Code Ann. §47-14-102 ..... 2, 15
Tenn. Code Ann. §47-14-103 ..... 2, 15

Other Authorities:

11 A.L.R.3d §1498 24

No. 88-1185

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM S. WALTERS, JR.,
Petitioner,

vs.

FIRST TENNESSEE BANK
N.A. MEMPHIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, First Tennessee Bank National Association (formerly First Tennessee Bank N.A. Memphis), hereby responds to and opposes the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, review of which is sought by Petitioner, is reported at 855 F.2d 267 (6th Cir. 1988). It

is also reproduced in Petitioner's Appendix at A-1. Petitioner's Petition to Rehear in Court of Appeals Case No. 86-6031 is reproduced in Petitioner's Appendix A-86. The Order of the United States Court of Appeals, Sixth Circuit (filed October 14, 1988) denying Petitioner's Petition to Rehear is reprinted in Petitioner's Appendix at A-59, although it is erroneously reported by Petitioner to have been filed on October 14, 1986. The original opinion of the United States District Court for the Western District of Tennessee, Western Division, styled "Ruling on Post-Trial Arguments and Motions", which initially disposed of Petitioner's claims, is reprinted in Petitioner's Appendix at A-32. [Petitioner's Appendix is hereinafter abbreviated as "Pet. App." Respondent's Appendix is abbreviated as "Resp. App." References to the record are denoted herein by the abbreviation "R." The transcript of the trial is indicated by the abbreviation "Tr."]

CONSTITUTIONAL PROVISIONS AND STATUTES

Pursuant to Supreme Court Rule 34.2 Respondent states that the constitutional provisions and statutes relevant to this Petition are set forth in the Petition for Writ of Certiorari and in the Petitioner's Appendix, with the exception of the following:

1. Tenn. Code Ann. §47-14-102 (1979): (See Resp. App.)
2. Tenn. Code Ann. §47-14-103 (1979): (See Resp. App.)

COUNTER-STATEMENT OF THE CASE

Because Petitioner does not clearly set forth the factual background of this case, and because an understanding of the procedural history is important to an understanding of why the Petition should be denied, this Counter-Statement of the Case is provided by Respondent.

Three cases were consolidated for trial and all were appealed to the United States Court of Appeals for the Sixth Circuit. However, because only *one* of the three consolidated cases was made the subject of a Petition for Rehearing in the Court of Appeals, it is respectfully submitted that the issues raised by Petitioner relative to his usury claim have not been preserved by his filing of the Petition for a Writ of Certiorari. The remaining issue, which Petitioner contends involves the question of the type of intent to defraud required under the mail fraud statute, 18 U.S.C. §1341, was the one issue raised in a case which was made the subject of a timely Petition to Rehear, but should not be reviewed by this Court for the independent reasons hereinafter set forth.

Because no Petition to Rehear was filed with regard to the cases in which the usury issues were raised, no timely Petition for Writ of Certiorari to this Court has preserved the issues in those separate cases. In order properly to apprise the Court of the issues involved in the consolidated cases and the issues remaining in the one case over which this Court has jurisdiction, the following statement of the case is offered.

Three consolidated cases were tried in the United States District Court for the Western District of Tennessee, Western Division commencing on August 26, 1985, before the Honorable Robert M. McRae, Jr., Chief Dis-

trict Judge, sitting with a jury. The trial lasted approximately two (2) weeks.

The first of the three cases, and the only one which is properly the subject of this Petition, was filed on May 28, 1982 by William S. Walters, Jr. ("Petitioner") against First Tennessee Bank N.A. Memphis ("Respondent") claiming, in essence, that Respondent charged Petitioner more interest than he agreed to pay under the terms of a $475,000 promissory note (Counts I and III). That case bore Case No. 82-2391 in the trial court and was assigned Case No. 86-6031 in the United States Court of Appeals for the Sixth Circuit. Petitioner's theory was that Respondent had an "announced" prime rate and a different and secret "true" prime rate; thus Petitioner alleges "prime rate fraud." The Complaint also alleged misrepresentation (Count II), breach of confidential relationship (Count IV), violations by Respondent of various provisions of 18 U.S.C. §1961, *et seq.* ("RICO") (Count V), and usury (Count VI). When the Complaint was amended, the usury count was dropped. (R. 9, Amended Complaint) Respondent filed an answer denying liability, raising affirmative defenses, and counterclaiming with regard to the unpaid balance of the promissory note. At the close of all proof the trial court directed a verdict in favor of Respondent on all claims asserted by Petitioner in his Complaint, as amended. [Tr. pp. 1724-1745 and p. 1778, ll. 2-7]

The trial court also directed verdicts in favor of Respondent as to all similar counts remaining in a shareholder derivative complaint which involved two promissory notes in the amounts of $1,341,000 and $376,000, executed on behalf of a corporation partially owned by Petitioner and known as Ten Tex Marine, Inc. ("Ten Tex"). This suit had been filed by Petitioner on behalf

of himself and the other shareholder of Ten Tex (but without the other shareholder's approval) under Case No. 82-2869 in the trial court. This case was assigned Case No. 86-6033 in the Court of Appeals. The counts in that Complaint which were disposed of by the directed verdict included breach of contract (Counts I and VII), RICO (Counts II, III & IV), fraud (Count V), and misrepresentation (Count VI). [Tr. pp. 1724-1745, and p. 1778] The usury counts in the derivative action had previously been dismissed on September 20, 1984 on Respondent's Motion for Summary Judgment. This derivative suit was not brought before this Court by the Petition for Writ of Certiorari.

The remaining action, filed on October 19, 1982, was initiated by Fischer Lime and Cement Company, Inc. ("Fischer") against Petitioner and Respondent. In connection with the $475,000 loan to Petitioner, Respondent had taken from Petitioner, as collateral, an assignment of a promissory note from Fischer to Petitioner (the "Fischer note"). After Petitioner defaulted on his obligation, and in accordance with the security agreements, proceeds from the Fischer Note were applied by Respondent to Petitioner's outstanding interest on the defaulted loan. This action in the nature of an interpleader was instituted when the stakeholder, Fischer, was "notified" by counsel for Petitioner that it should cease making monthly payments on the Fischer Note to Respondent. After the commencement of the interpleader action, Fischer Note payments were deposited into the registry of the trial court. The only issue from that case which was appealed to the Sixth Circuit Court of Appeals was one portion of an issue raised by Petitioner in filing a cross-claim against Respondent in the interpleader action on November 23, 1982 alleging usury. As to this count, on

August 9, 1985 the trial court had ruled prior to trial that the statute of limitations barred any cause of action for alleged usury occurring prior to May 22, 1980. Petitioner does not complain concerning that ruling and did not appeal that portion of the trial court's ruling to the Court of Appeals for the Sixth Circuit.

As to the allegations of usury in that third action which were *not* held to be barred by the statute of limitations, the trial court granted a directed verdict in favor of Respondent with regard to those claims for collections allegedly occurring from October 8, 1980 through June 30, 1981, based upon a construction of state and federal interest rate statutes. The only issue related to the usury allegations which survived Respondent's motions was an allegation in connection with interest charges on two specific instances covering 32 days from May 29, 1980 through June 8, 1980 and from September 8, 1980 through September 25, 1980. The total of allegedly "excess" interest charged on the $475,000 loan during this period was $337.06. With regard to those alleged overcharges, Respondent's witness testified that the incorrect charges were inadvertent, and that they arose because of a clerical error in failing to adjust manually the interest rate ceiling on Petitioner's notes on its computer on the precise date the federal discount rate changed. The testimony established that those adjustments had to be made manually, and that the same clerical errors resulted in undercharges favorable to Petitioner, as well as overcharges, and that the cumulative amount of undercharges always exceeded the amount of any overcharges. Although no contrary testimony or evidence was presented, the trial court submitted an issue to the jury by means of the following special interrogatory:

> Did the defendant First Tennessee Bank knowingly take or receive from or charge to the plaintiff William S. Walters, Jr. interest in excess of the lawful rate on the $475,000 note signed May 3, 1979, between the date of its signing and December 2, 1980?

The jury answered the interrogatory, which was the only issue addressed to them, by responding, "Yes."

Because there were numerous questions of law which might affect the ultimate judgment, the court directed counsel for the parties to prepare proposed judgments, and heard arguments on the respective positions of the parties. On June 5, 1986 the trial court entered its Rulings on Post-Trial Arguments and Motions. (Pet. App. 32) The trial court found that there was no evidence from which the jury could conclude that the collection of allegedly excess interest was "knowingly done." The Court's ruling contains a lengthy and comprehensive discussion of both the legal and factual justifications for its conclusion. In explaining its reasons for so holding, the trial court observed in part that:

> The plaintiff must prove that the taking of excess interest was 'knowingly done.' The Plaintiff has offered no direct or sufficient circumstantial proof on the issue of 'knowingly done.'
>
> . . .
>
> Although counsel for Mr. Walters attempted to impeach Mr. Dudley's testimony by suggesting in his questions that the overcharges were or may have been intentional, he produced no witness to testify on this point and presented no other evidence which would tend to prove this intent. (Pet. App. 40-41)

On appeal, this case was assigned case number 86-6032 in the Sixth Circuit Court of Appeals.

All three cases were separately appealed to the United States Court of Appeals for the Sixth Circuit and the trial court was affirmed in all three cases in a consolidated opinion. (Pet. App. 1) Petitioner filed a Petition to rehear only in Case No. 86-6031. (Pet. App. 86) As noted above, this was an appeal from Case No. 82-2391 below, and as listed by counsel for Petitioner in his Civil Pre-Argument Statement, the single issue presented for review in that case was:

> In order for a corporate defendant to be liable for engaging in a mail fraud, is it necessary that the corporate offices responsible for the conduct proven have engaged in the conduct intending to do something wrong?

In view of the fact that the opinion of the United States Court of Appeals for the Sixth Circuit disposing of all issues raised in the three cases was filed on August 16, 1988, and since a Petition to Rehear was filed in only one of the three cases (86-6031) it is respectfully submitted that this Petition for Writ of Certiorari is timely only with regard to that one case, since the time for filing the Petition for Writ of Certiorari pursuant to Supreme Court Rule 20.4 was extended by the Petition to Rehear only in Case No. 86-6031.

Without regard to the untimeliness of the Petition with regard to all issues other than the issues raised concerning the mail fraud statute, 18 U.S.C. §1341, all issues will be addressed below in order to point to additional compelling reasons why these are not proper cases for review by this Court.

SUMMARY OF ARGUMENT

The questions which Petitioner claims have been raised by his Petition for Writ of Certiorari are not proper questions for consideration by the Court. None of the considerations governing review set forth in Supreme Court Rule 17.1 exist in this case.

As a jurisdictional matter, only the issue denominated as Question 7 in the Petition is properly before the Court because the Petition is not timely with regard to the other issues, which were issues raised in separate cases which were not made the subject of timely Petitions to Rehear.

In addition to the jurisdictional defect, Question 1 presented in the Petition is not a proper subject for review because it challenges the constitutionality of interest rate relief statutes which have expired and therefore do not merit review by the Court. Petitioner simply seeks an advisory opinion on this issue, asking the Court to "inform" Congress so that it will act properly "the next time it faces the necessity to address an interest rate crisis." (Pet. p. 15) Moreover, the constitutional challenge is based upon an alleged impairment of contract yet the courts below made factual findings to the effect that the contract in question, i.e., the promissory note, clearly anticipated by the use of certain language in the note floating interest rates based upon changes which might occur in the law. Therefore, from a factual standpoint, there has been no contractual impairment.

The several Questions purportedly raising the issues of the requisite intent required under the usury statute and the mail fraud statutes are not proper subjects for

review because the courts below found a *total* absence of proof of intent with regard to either of these allegations.

The Petition does not present any issue involving conflict between an opinion of the Court of Appeals for the Sixth Circuit and the decisions of another federal court of appeals on the same matter; nor has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, nor so far sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision.

ARGUMENT

The Petition For Writ Of Certiorari Is Not Timely And The Court Has No Jurisdiction To Review The Usury Issues Described In The Petition

Supreme Court Rule 20.4 provides that: ". . . [I]f a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing." However, no provision of the Rules tolls the time for filing a petition for writ of certiorari in separate but consolidated cases where a petition for rehearing is filed in only one of the several cases which were consolidated for trial, but which were appealed separately to the Court of Appeals and assigned separate case numbers.

Since a petition to rehear was not filed in Case No. 86-6032 nor in Case No. 86-6033, the 90 day period for filing a petition for writ of certiorari in those cases

expired on or about November 14, 1988. The usury issues attempted to be raised by Petitioner in this Petition for Writ of Certiorari were not encompassed within Case No. 86-6031, the only case in which a petition to rehear was filed.

28 U.S.C. §2101(c) establishes the time for invoking this Court's jurisdiction in civil cases. Where, as here, the time for filing a petition for writ of certiorari is established by Congress, the timely filing of the petition is a requisite to the Court's jurisdiction. *Schacht v. United States,* 398 U.S. 58, 65, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Matton Steamboat Co., Inc. v. Murphy,* 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943); *Department of Banking v. Pink,* 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942); *Citizens' Bank v. Opperman,* 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919). It is respectfully submitted that this Court has no jurisdiction to review the usury issues raised by Petitioner.

While disagreeing that the usury related questions are properly before the Court from a jurisdictional standpoint, the following responses are given with regard to all issues which Petitioner attempts to raise in his Petition for Writ of Certiorari.

The Trial Court And The Court Of Appeals Were Correct In Holding That Under Applicable Law, Including The Surcharge Amendments to 12 U.S.C. §85 And §86, Respondent's Charges On The $475,000 Note Were Proper

In Questions 1, 2 and 6 raised in the Petition, Petitioner argues that in executing a promissory note on May 3, 1979, even though that note provided for a floating rate of interest, Petitioner was receiving a contractual

guarantee that he would never be charged more interest than the maximum rate chargeable on the date of signing. Based upon that assumption, Petitioner then seems to argue that federal preemption legislation which granted interest rate relief during and after 1980, if applied to Petitioner's note, would constitute an unconstitutional impairment of this assumed "contract".

Petitioner candidly observes that the legislation being questioned has expired (Pet. p. 13), and is no longer in existence. While this fact argues forcefully against review by this Court, Petitioner still seeks what is essentially an advisory opinion citing what he calls the general public's entitlement "to have Congress rightly informed by this Court." (Pet. p. 15) Respondent submits that it is well settled that where the issue sought to be reviewed concerns a statute that has been repealed, the issue does not merit consideration by this Court. *District of Columbia v. Sweeney*, 310 U.S. 631, 60 S.Ct. 1082, 84 L.Ed. 1402 (1940). Likewise, where the enactment of a statute subsequent to the commencement of litigation confines the impact of an alleged violation to the case at bar, certiorari should not be granted. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Here, Petitioner admits not only that the questioned statute has expired, but he also admits that "statutes of limitation have run on any similar claims which, perhaps, could have been made in years past." (Pet. p. 15) Therefore, this is not a compelling case for review by this Court, and mere advisory opinions or opinions based upon hypothetical facts should not be rendered by the Court. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

In examining the merits of Petitioner's claims, it must be noted that the interest preemption statutes referenced by Petitioner have never been declared unconstitutional by any Court. More importantly, those statutes could not constitute an impairment of Petitioner's contract because the contract embodied in the $475,000 promissory note obviously anticipated, because of its floating rate of interest, that it might in the future exceed the rate which was the maximum legal rate on the date of signing. This recognition is evidenced by the following language in the note [Tr. Ex. 3]:

> The rate of interest on the unpaid principal balances of the indebtedness hereby evidenced shall be adjusted as of each day that the prime rate is changed; provided, always, however, that notwithstanding any changes in said prime rate, the rate of interest hereon prior to maturity shall never be more than the maximum lawful contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge *from time to time.*
>
> . . .
>
> It is the intention of the Maker and the Bank to contract in strict compliance with the usury laws as set forth at 12 U.S.C. §85, and the laws of the State of Tennessee incorporated therein by reference; and, accordingly, in no event and upon no contingency shall the Bank ever be entitled to receive, collect, or apply as interest any interests, fees, other payment equivalent to interest, in excess of the maximum contract rate which may, *from time to time*, be lawfully charged to the Maker hereof *under the applicable law by a national bank* having its principal place of business in the State of Tennessee . . . . (Emphasis supplied.)

Clearly, the parties contemplated that the maximum rate allowed under the law would fluctuate with time, thus the language "from time to time" throughout the note. The Court of Appeals clearly made this factual finding. (Pet. App. 21) If it had been the intention of the parties to simply provide an absolute 18% ceiling, that would have been simple enough to insert; and it is respectfully submitted that the absence of that language, together with the inclusion of the language quoted above, makes the construction urged by Petitioner illogical.

In his Question 6, Petitioner raises the issue of whether the trial court correctly ruled that Respondent was entitled to the benefit of the preemptive "surcharge" statutes in the case of this note. (Pub. L. No. 96-221 and Pub. L. No. 96-399) Petitioner, however, did not brief that issue at the Court of Appeals, choosing instead to attempt to incorporate by reference a brief filed with the trial court.

In rejecting Petitioner's argument as to the operation of these statutes the Sixth Circuit Court of Appeals observed:

> Walters superficially challenges the district court's construction of Pub. L. No. 96-221 and Pub. L. No. 96-399 in its appellate brief by simply referencing its trial memorandum. We cannot countenance this attempt to circumvent Fed. R. App. P. 28(g) and its limitation on appellants' briefs to 50 pages. (Pet. App. p. 21, n. 5)

Because the issue was not properly raised before the Court of Appeals, this Court should not review the issue. However, Respondent disagrees that it misinterpreted the applicable statutes and amendments and submits that the

trial court correctly adopted Respondent's position, which is set forth below.

The $475,000 loan was made and the note was signed on May 3, 1979. The usury law on which Respondent relied at that time and until December 2, 1980, was the Tennessee usury law. (Tenn. Code Ann. §§47-14-102 & 103) Respondent complied with that law.

Respondent, as a national bank, was entitled to rely on the Tennessee usury law during the period May 3, 1979 to December 2, 1980 by virtue of 12 U.S.C. §85, which allows a national bank to charge the greater of (i) the rate permitted by state law or (ii) 1% over the Federal Reserve discount rate in effect in the reserve district in which Respondent is located.

Tennessee law permitted an interest rate of 5% over the discount rate of the Federal Reserve Bank in Atlanta, with a maximum of 18%. Except for the two inadvertent errors testified to by Mr. Charles B. Dudley, III, and discussed later in this brief, which did not occur during the period of the Federal Reserve surcharge, during the period when Respondent relied on Tennessee law, it *never exceeded the rate permitted by state law.* This fact is not disputed by Petitioner.

On April 1, 1980, at a time when Respondent was relying on state law and the rate charged Petitioner was within the state law ceiling, Congress adopted Pub. L. No. 96-221.

Pub. L. No. 96-221 [codified at 12 U.S.C. §86a] amended 12 U.S.C. §85 to:

> (a) Preempt any state law, whether statutory or constitutional, to the extent state law imposed a rate ceiling lower than Pub. L. No. 96-221 imposed;

(b) Permit national banks to charge (on loans of the type to Plaintiff) up to "5% in excess of the discount rate, *including any surcharge thereon,* . . . in effect at the Federal Reserve Bank in the Federal Reserve District where the person is located";

(c) Apply only with respect to business . . . loans in amounts of $25,000 or more made in any state during the period beginning on April 1, 1980, and ending on the earlier of -

(1) April 1, 1983; or

(2) [The date such state expressly opts out of the effect of Pub. L. No. 96-221 (which Tennessee never did)]

(d) Provide that where the amendments in paragraphs (a), (b) and (c) above and "any other provision of law . . . apply with respect to the same loan . . . such loan . . . may be made at the highest applicable rate"; and

(e) Repeal as of March 31, 1980, Pub. L. No. 96-104 and parts of Pub. L. No. 96-161 [neither of which were relied on by Respondent for Petitioner's loan].

When enacted, Pub. L. No. 96-221 by its express terms did not apply to Petitioner's loan because the loan was not made "during the period beginning April 1, 1980 and ending April 1, 1983." At that time (April 1980), Respondent continued to rely on Tennessee law and its rate was within the Tennessee ceiling.

Pub. L. No. 96-221 nonetheless becomes important to this issue because Pub. L. No. 96-399 on October 8, 1980 amended Pub. L. No. 96-221 to *add* a provision that permitted Pub. L. No. 96-221 (with its provision for a sur-

charge) to apply to Petitioner's loan by adding to Pub. L. No. 96-221 the following language:

> (b) A loan shall be deemed to be made during the period described in subsection (a) [April 1, 1980 to April 1, 1983] if such loan -
>
> * * *
>
> (B) was made *prior to* or on April 1, 1980, and bears or provides for interest during such period on the outstanding amount thereof at a variable or fluctuating rate. (Emphasis added.)

Pub. L. No. 96-399 further provided:

> (2) The amendments made by paragraph (1) [those amendments discussed above] take effect on April 1, 1980.

Pub. L. No. 96-399 thus made Pub. L. No. 96-221 applicable to Petitioner's loan because that loan was "made prior to April 1, 1980, and [bore] interest during such period on the outstanding amount thereof at a variable or fluctuating rate . . . ."

At the time Pub. L. No. 96-399 was adopted, Respondent was continuing to rely on Tennessee law for the rate ceiling. It was not until December 2, 1980 that Respondent first relied on federal law for the applicable interest rate ceiling. At that time, Pub. L. No. 96-221 as supplemented by Pub. L. No. 96-399:

> (a) Preempted any state usury law, whether statutory or constitutional, to the extent state law imposed a rate ceiling lower than Pub. L. No. 96-221 imposed.
>
> (b) Permitted national banks to charge (on loans of the type to Petitioner) up to "5% in excess of

the discount rate, *including any surcharge thereon,* . . . in effect at the Federal Reserve bank in the Federal Reserve district where the person is located."

(c) Applied to loans made between April 1, 1980 and April 1, 1983 and to loans made *prior to* April 1, 1980 which provided for interest during such period on the outstanding balance thereof at a variable or fluctuating rate; and

(d) Provided that where the amendments in paragraph (a), (b) and (c) above and "any other provision of law . . . apply with respect to the same loan . . . such loan may be made at the highest applicable rate." (Emphasis added.)

12 U.S.C. §86a, as amended by Pub. L. No. 96-211 and Pub. L. No. 96-399, thus applied to the May 3, 1979 loan. It is on that statute that Respondent justifiably relied after December 2, 1980 and consequently, the application of the surcharge to the federal discount rate does not constitute usury.

Petitioner contended at trial that reliance by Respondent on 12 U.S.C. §86a was incorrect. Although he does not address the issue in his brief, the trial brief which he attempted to incorporate by reference claims an earlier amendment to 12 U.S.C. §86a, i.e., Pub. L. No. 96-161, exempted Tennessee from the preemptive federal usury legislation until July 1, 1981. This is an incorrect reading of the statute.

Pub. L. No. 96-161 permitted national banks to charge 5% over the discount rate of the Federal Reserve Bank in the district where the bank is located on business loans in excess of $25,000. It did not provide a surcharge. The amendment was effective from December 28, 1979

and *expired* on the earliest of (1) July 1, 1980 (in states where there was a statutory usury provision); or (2) July 1, 1981 (in states where there was a constitutional usury provision); or (3) the date when the state specifically and by reference rejected the federal usury law. As stated earlier, Respondent never relied on this statute, as the loan in question was made prior to its effective date.

It is evidently Petitioner's position that in states with a constitutional provision regarding usury the federal enactments did not become *effective until* July 1, 1981.

Petitioner reaches this conclusion on the wording of §213 to Pub. L. No. 96-161, which reads as follows:

> Notwithstanding any other provision of this title, subject to Sections 207(2) and (3) [the opt out provisions], the provisions of *this title* shall continue to apply *until July 1, 1981,* in the case of any state having a constitutional provision regarding maximum interest rates. (Emphasis added.)

It is clear that this provision gives the *expiration* date of the amendment, and not its *effective* date. Only by interpreting the emphasized phrase "this title" in the above quoted portion of §213 to mean all of 12 U.S.C. §85 and 12 U.S.C. §86 does Petitioner's argument logically proceed to the conclusion urged by him. Apparently, Petitioner reads §213 to mean that the provisions of 12 U.S.C. §85 (Petitioner's interpretation of the meaning of "this title") as they existed *prior to* the amendments contained in Pub. L. No. 96-161 would continue in effect until July 1, 1981 in those states having a constitutional provision regarding maximum interest rates. Under Petitioner's interpretation, the preemptive provi-

sions of Pub. L. No. 96-161 become effective in those states having constitutional usury provisions *beginning* July 1, 1981. This interpretation leads to a curious result in that Pub. L. No. 96-161 *ceases* to be effective in those states having *statutory* usury provisions on July 1, 1980, a full year *before* they would become effective in states having constitutional usury provisions. Obviously such an interpretation makes no sense and must be deemed to be without merit.

Petitioner's argument on this issue and any refutation of it is unnecessary because Respondent never relied on Pub. L. No. 96-161, as that enactment in no way applied to the Petitioner's loan. The effective date of Pub. L. No. 96-161 was December 28, 1979 and Petitioner's loan was made on May 3, 1979. There is nothing in Pub. L. No. 96-161, unlike Pub. L. No. 96-221, as amended by Pub. L. No. 96-399, that permits retroactive application. In the absence of applicable federal legislation during that period, Respondent continued to operate under state usury law. The proof showed that during the period that Respondent was operating under state law, it never exceeded the 18% ceiling (except for the two inadvertent errors testified to by Mr. Dudley and addressed later in this brief).

The first of the federal usury laws that applied to Respondent and to Petitioner's loan is found in Pub. L. No. 96-221 as amended by Pub. L. No. 96-399, codified at 12 U.S.C. §86a. By its terms, this enactment, effective April 1, 1980, *repealed Pub. L. No. 96-161,* and preempted any state law, whether statutory or constitutional, that would prohibit the charging of a rate equal to 5% over the discount rate of the Federal Reserve Bank, *including any surcharge.* The amendments found in Pub.

L. No. 96-399, enacted October 8, 1980, made that rate applicable to variable rate loans made prior to April 1, 1980. Respondent correctly relied on this statute, as amended, because that statute preempted state law, and because it applied to the Petitioner's loan, which was a variable loan made before April 1, 1980. The rates charged Petitioner from December 2, 1980 to November 16, 1981, although over the 18% usury ceiling of Tennessee, were not usurious because state law had been effectively preempted by the federal statute that allowed the higher rate. Simply stated, Respondent made no mistake of law in the rates it charged Petitioner.

The Trial Court And The Court Of Appeals Were Correct In Holding That There Is No Evidence In The Record To Support Petitioner's Claim of Usury

Petitioner's claim that Respondent collected some "$25,000" in excess interest is based upon his incorrect reading of the surcharge amendments to the federal usury statutes as explained above. The only other usury allegations discussed in the Petition relate to the issue of whether the charging of $337.06 in allegedly "excess" interest on the $475,000 promissory note was *"knowingly done"* as required to subject Respondent to the forfeiture and penalty provisions of 12 U.S.C. §86. That issue is addressed in Petitioner's Questions 3, 4 and 5 of his Petition for Writ of Certiorari. Both the trial court and the Court of Appeals held that Petitioner simply failed to carry his burden of proof on that issue. The focus of the inquiry by the Court of Appeals in addressing this issue was whether there was *any* evidence that the overcharges were made "knowingly" (Pet. App. 23) since Respondent admitted that the interest charges occurred.

The Petitioner has the burden of meeting the statutory test; a plaintiff must prove that the taking of excess interest was "knowingly done." The Petitioner offered no proof on the issue of "knowingly done." (Pet. App. 40) The *only* testimony at the trial concerning this issue came from Respondent's witness, Charles B. Dudley, III, who testified that Respondent *inadvertently* and *mistakenly* charged Petitioner in excess of the amount allowed by the federal discount rate plus five percentage points on two occasions (May 29, 1980 through June 8, 1980 and September 8, 1980 through September 25, 1980). Mr. Dudley testified that in each of those two instances the overcharge resulted from an inadvertent oversight in a clerk's failure to lower Respondent's usury ceiling on the computer with regard to Petitioner's notes when the federal discount rate (and therefore the usury ceiling) dropped. Mr. Dudley testified that Respondent was undergoing a conversion in its computer systems which made it impossible to add enhancements to the existing system. Therefore it was necessary at the relevant times manually to input the changes in the usury ceiling with regard to each variable rate note. On these two occasions there was simply a failure to reduce the interest ceiling on the computer with regard to Petitioner's note. [Tr. Dudley, pp. 1341-1355 & Ex. 77 & 78]

Mr. Dudley testified that the usury ceiling or the prime rate changed approximately one hundred times during the period covered by this lending transaction. [Tr. Dudley, p. 1340] He also testified that on three occasions Respondent *undercharged* Petitioner due to the same type of inadvertent clerical errors in setting the rate on the computer that caused the "overcharges." [Tr. Dudley, pp. 1341-1355 & Ex. 77 & 78] Mr. Dudley's un-

contradicted testimony established that these undercharges *preceded and exceeded* the amount of the overcharges, so that at all times Respondent on a cumulative basis, charged Petitioner *less* than allowed by law and the terms of the note. [*Id.*]

There was absolutely no contradictory testimony from Petitioner or from any other witness during the trial on the issue of the inadvertent errors that resulted in the so-called "overcharges." Although counsel for Petitioner attempted to impeach Mr. Dudley's testimony by suggesting in his questions that the overcharges were or may have been intentional, he produced no witness to testify on this point and presented no other evidence which would tend to prove any such intent, or to contradict or impeach Mr. Dudley. (Pet. App. 41-42) Mr. Dudley's trial testimony, his deposition testimony and his Affidavit in this case all reflect that the "overcharges" were unintentional and inadvertent. Petitioner is not entitled to a *presumption* of usury since the burden of proof is on the plaintiff.

There is affirmative proof in the record showing absence of intent (undercharges), and in light of the harsh penalties for usury and the small amount of the overcharges ($337.06), it is illogical to presume an intent to exact excess interest on this note. Both the trial court and the Court of Appeals so found.

It has been consistently held by courts considering the issue of usurious intent that inadvertent errors in bookkeeping or mathematical computations, when not mistakes of law, are insufficient to show intent. *Ford Motor Credit Corp. v. Catalani,* 238 Ark. 561, 383 S.W.2d 99 (1964); and *White v. Kaminsky,* 196 Tenn. 180, 264

S.W.2d 813, 815 (1954). *See also* cases collected at 11 A.L.R.3d §1498. In the instant case, there is no usurious intent evident on the face of the note which distinguishes it from typical usury cases. *See Mutual Protective Corp. v. Palatnick*, 118 Conn. 1, 169 A. 917 (1934). In view of the foregoing, the trial court and the Court of Appeals held that proof of the requisite intent under 12 U.S.C. §86 was lacking and for that reason there was no violation of the statute. Thus the trial court entered judgment for Respondent, notwithstanding the jury interrogatory. [(R. 51, Order on Motions for Summary Judgment, entered September 20, 1984, p. 7; R. 128, Ruling on Post-Trial Arguments and Motions)]

Based upon the absence of any proof at trial that the overcharges were made knowingly, the trial court should not have sent the issue to the jury and properly granted a judgment in favor of Respondent. The applicable case law provides that "the burden to plead and prove usury which does not appear on the face of an instrument rests on the party seeking to avoid the instrument." *Maestro Music, Inc. v. Rudolph Wurlitzer Co.*, 354 P.2d 266, 271 (Ariz. 1960); and *Murphy Finance Co. v. Fredricks*, 127 N.W.2d 924 (Neb. 1964). The burden of proof extends to proof of the element of intent. *Sumner v. Investment Mortgage Company of Florida*, 332 So.2d 103 (Fla. App. 1976).

As the Court of Appeals and the trial court held, there was an absence of proof of knowing conduct by the Respondent. This is an essential element of usury under 12 U.S.C. §86 which Petitioner had the burden of proving "convincingly". *Wheeler v. Union National Bank of Pittsburgh*, 96 U.S. 268, 270, 24 L.Ed. 833 (1878).

Petitioner Failed To Prove The Elements Of A Violation Of The Mail Fraud Statute (18 U.S.C. §1341)

Finally, in Question 7, Petitioner seeks review of the factual determination of both the trial court and the Court of Appeals that there had been no evidence presented from which the jury could conclude that there had been intent to defraud on behalf of Respondent as required to establish the "predicate act" under RICO i.e., a violation of the mail fraud statute, 18 U.S.C. §1341. While Petitioner attempts to frame this issue in terms of the need for a determination of the requisite level of intent to defraud required under the mail fraud statute, Respondent submits that this is not a proper case for review of that issue since both the trial court and the Court of Appeals in this case point to the complete absence of evidence of *any* type of intent to defraud, either passive or active. What Petitioner is actually seeking is a review by this Court of factual findings by the trial court and the Court of Appeals. This Court will not undertake such a review. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed. 479 (1951). Petitioner cites to no support in the transcript and makes no reference to any testimony or proof whatsoever which he contends would support a finding that Respondent has committed mail fraud. There is no such proof.

Although Respondent contends that the courts below were correct in dismissing the RICO counts for a number of reasons, and although the trial court stated alternative grounds for its decision, clearly the lack of any proof in the record whatsoever as to the existence of mail fraud, and therefore the lack of a "predicate act" under RICO adequately supports the rulings below.

Petitioner seems to argue that actual fraud is not a necessary element of a violation of the mail fraud statute. In *Epstein v. United States,* 174 F.2d 754 (6th Cir. 1949), the Court of Appeals for the Sixth Circuit held that:

> In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing *active or actual fraud.* A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud. (Emphasis supplied.)
>
> . . .
>
> Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases. That, however, is no qualification of the rule that to sustain a charge of using the mails to defraud, there must be proof of an *actual fraud* rather than a constructive fraud. (Emphasis supplied.)

174 F.2d at 766.

Although the element of knowing participation in a scheme to defraud may in appropriate cases be established circumstantially, it cannot be based on "constructive" knowledge. *Windsor v. United States,* 384 F.2d 535 (9th Cir. 1967).

Relying upon a holding of this Court, the Sixth Circuit has recently applied the ruling in *Epstein, supra* in the context of a violation of the mail fraud statute as a predicate act in a RICO case. *Bender v. Southland Corp.,* 749 F.2d 1205 (6th Cir. 1984). In that case the Court, upholding the dismissal of RICO counts in the action, stated as follows:

> We further hold that the district court properly dismissed the RICO claim in which the plaintiffs allege that Southland committed mail fraud. The crime of

mail fraud has two elements: a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954); *United States v. Talbott,* 590 F.2d 192, 195 (6th Cir. 1978); *United States v. Schilling,* 561 F.2d 659, 661 (6th Cir. 1977). This court has held that the scheme to defraud must involve:

> [I]ntentional fraud, consisting in deception *intentionally* practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end desired. [*A scheme to defraud*] *requires intent to deceive or defraud.* [Emphasis the Court's.]

Epstein v. United States, 174 F.2d 754, 756 (6th Cir. 1949). (Citations omitted.) This court has also held that the scheme to defraud must involve "misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Van Dyke,* 605 F.2d 220, 225 (6th Cir.), *cert. denied,* 444 U.S. 994, 100 S.Ct. 529, 62 L. Ed.2d 425 (1979).

749 F.2d at 1215-1216.

Petitioner failed to introduce any evidence from which a jury could find a violation of 18 U.S.C. §1341. Furthermore, Petitioner failed to introduce any evidence of the underlying claim of a scheme of misrepresentation which it claimed as giving rise to its RICO count. [R. 128, Ruling on Post-Trial Arguments and Motions, Pet. App. p. 34] After two weeks of proof, fully considered by the trial court and the Court of Appeals, Petitioner now seeks to have this Court act as a fact finding body and second guess the courts below.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari does not present issues which warrant review by this Court. The Petition should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that three copies of this Brief have been served upon all parties required to be served by United States Mail, postage prepaid, on the 9th day of February, 1989, including Mr. Larry E. Parrish, The Crescent Center, 6075 Poplar Avenue, Suite 400, Memphis, Tennessee 38119.

LEO M. BEARMAN

APPENDIX

Tenn. Code Ann. §47-14-102 (1979). Definitions.— The following terms shall have the following meanings, subject to additional definitions, specifications and limitations contained in provisions of other statutes relating to particular categories of lenders or of transactions:

(1) "Interest" is compensation for the use or detention of, or forbearance to collect, money over a period of time; and does not include compensation for other purposes, including, but not limited to, time-price differentials, loan charges, brokerage commissions, or commitment fees. For example, when you borrow money, you pay the lender simple interest (which is like rent) for the use of the money. The amount of interest you pay depends on:

(A) the principal, which is the amount you borrow;

(B) the rate, which is a percent based on a period of time, usually 1 year; and

(C) the number of periods of time that you have the use of the money.

Thus, interest equals principal X rate X time. Accordingly, to determine the interest charged for borrowing $500 for 3 years if the rate of interest is 9% per year, we first calculate the interest for 1 year using the proportion rate equal percent/base, or 9/100 equals I/500; where I stands for interest, interest equals 9 X 500/100 equals $45. For 3 years, the interest equals 3 X $45 equals $135; or you can combine steps 1 and 2 so that interest for 3 years equals (9% X $500) X 3 equals $135, presuming that no payment is made toward the principal of the loan during the three year period.

(2) "Effective rate of interest" is the simple rate of interest, i.e., the ratio between the interest payable on an obligation and the principal for a period of time, including the result of converting compound, discount, add-on, or other nominal rates of interest into simple rates of interest.

(3) "Formula rate" means an annual rate of interest five (5) percentage points above the rate for advances and discounts to member banks under §§ 13 and 13a of the Federal Reserve Act, as now or hereafter may be amended, in effect at the federal reserve bank of the federal reserve district which includes the largest geographical area of this state.

(4) "Applicable formula rate" means either:

(A) the "formula rate" in effect at any given time; or, at the election of the parties to the contract.

(B) the "formula rate" last published in the Tennessee Administrative Register prior to the date of the contract.

(5) "Actuarial method" means the method of allocating payments made on a debt between the principal and interest pursuant to which payment is applied first to accumulated interest and any remainder is subtracted from, or any deficiency is added to, the unpaid principal balance of the debt.

(6) "Usury" is the collection of interest in excess of the maximum amounts authorized by or pursuant to this chapter or any other statute.

(7) "Principal" is the total amount of an obligation to pay money on which interest is to be computed. With respect to loans:

(A) principal is the total amount of money paid to, receivable by, credited to the account of, or payable for the account of, a borrower;

(B) loan charges and other charges for which the borrower contracts to pay may be included as principal, subject to such limitations as may be imposed by statute;

(C) precomputed interest may not be included as principal for the purpose of determining the simple or the effective rate of interest.

(8) "Loan charges" are compensation to the lender for services or expenses directly incident to a loan or contract to make a loan; and do not include compensation for other purposes, including, but not limited to, time-price differentials, interest, brokerage commissions, or commitment fees.

(9) "Time-price differential" is the difference, however denominated or expressed, between the amount charged on a sale of property, or a charge for services, for cash and the amount charged if payment were to be deferred or if payment were to be made in future installments; provided, however, that any difference in such amounts charged with respect to the sale of real property to be owned and occupied by the purchaser as his principal place of residence for family residential purposes shall be considered to be interest rather than time-price diferential.

(10) "Commitment fees" are compensation to the lender in return for its conditional or unconditional obligation during a certain period of time to make a loan or loans under specified terms and conditions.

(11) "Brokerage commissions" shall include all fees paid to mortgage bankers, banks, savings and loan associations, savings banks, or other parties regularly engaged in the business of originating and arranging for the placement of loans secured by mortgages or deeds of trust upon real estate for services performed in the origination and placement of such loans with third party lenders, whether the same be closed directly in the name of the lender or, in the alternative, in the name of such mortgage banker or other party with the intention to sell and transfer the same to such lender, provided that such sale or a substantial portion thereof is completed within one (1) year from the closing of such loan or the completion of construction, whichever is later. [Acts 1979, ch. 203, § 1.]

Tenn. Code Ann. §47-14-103 (1979). Maximum effective rates of interest.—Except as otherwise expressly provided by this chapter or by other statutes, the maximum effective rates of interest shall be as follows:

(1) For all transactions in which provisions of other statutes fix a maximum effective rate of interest for particular categories of creditors, lenders, or transactions, the rate so fixed;

(2) For all written contracts, signed by the party to be charged, and not subject to subdivision (1) of this section, the applicable formula rate; provided, however, that in no event shall the applicable formula rate exceed eighteen percent (18%) per annum; and

(3) For all other transactions, ten percent (10%) per annum. [Acts 1979, ch. 203, § 2.]